In the Supreme Court of the United States

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OCTOBER TERM, 1941

No. 153

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, as Owner of the Steamship "EDWARD LUCKENBACH",
Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, a corporation, NAVIGAZIONE LIBERA TRIESTINA, S.A., a corporation, SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, a corporation, (Owners and Underwriters of the Motorship "FELTRE"),

HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

*The names of the other cargo claimants fill three pages of the printed record (R. 78-81) and are omitted from the caption for the sake of brevity.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner Luckenbach Steamship Company, Inc., a corporation organized under the laws of the State of Delaware, and owner of the steamship "Edward Luckenbach", respectfully applies to this Honorable Court for a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring it to certify this cause to this court for review and correction.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a cause in admiralty arising out of a collision between the petitioner's vessel, the intercoastal steamship "Edward Luckenbach", and the Italian motorship "Feltre" that occurred in the Columbia River on February 17, 1937.

The litigation originated in the United States District Court for the Northern District of California where petitioner sought exoneration from and limitation of liability against claims by the owners and underwriters of the "Feltre" and her cargo in excess of one million dollars (R. 19, 33, 52). Petitioner also filed a cross-libel to recover its damages from the owners and operators of the "Feltre" (R. 184).

After a reference to a Commissioner who heard the testimony, mostly by deposition, and rendered a report, the District Court overruled exceptions to the Commis-

sioner's report and entered an interlocutory decree of mutual fault, holding both vessels to blame for the collision and granting petitioner a limitation of liability (R. 288, 298). The actual amount of damages, and the value of petitioner's vessel and pending freight for the purpose of limitation of liability, are yet to be determined, as the appeal was taken from the interlocutory decree (R. 302, 313).

Petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the decree that held the "Edward Luckenbach" at fault, and that court affirmed, by a divided court, the decree of the District Court against the "Edward Luckenbach" (R. 1415, 1416, 1460). A petition for rehearing was denied by the Circuit Court of Appeals (R. 1461).

The owner, operator, and underwriters of the "Feltre" filed a cross-appeal, but the court unanimously affirmed the decree of fault against that vessel (R. 1427, 1460).

The faults of the "Feltre", nearly all of which were established by uncontradicted testimony, were found by the District Court and affirmed by the Circuit Court of Appeals, as follows:

1. *The "Feltre" did not have a proper lookout, no lookout being stationed in the bow of the ship and no member of the watch being stationed elsewhere for the sole purpose of acting as lookout* (R. 1420). This fault was established by the "Feltre" testimony (R. 216-220) and was a positive violation of the statutory Rules of the Road (Art. 29, Inland Rules; 33 U.S.C. §221; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 102).

The Circuit Court of Appeals found that the "Feltre" did not hear the "Edward Luckenbach's" one-blast passing signal that was sounded in response to the one-blast signal from the "Feltre", and found, furthermore, that if the "Feltre" had maintained a proper lookout it was entirely possible that she would have heard the one-blast signal and avoided the confusion in her pilot's mind that led to the collision (R. 1422).

2. *The "Feltre" failed to sound a danger signal and to stop and reverse as required by the attendant conditions* (R. 1421).

The failure of the "Feltre" to sound a danger signal and to stop when she did not hear the "Edward Luckenbach's" one-blast answering signal was likewise established by the "Feltre" testimony (R. 220-224) and was a positive violation of the Rules of the Road (Art. 18, Rule III, Inland Rules; 33 U.S.C. §203; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 100).

3. *The "Feltre" sounded a two-blast signal and altered her course to her own left before the "Edward Luckenbach" assented* (R. 1421).

This maneuver, which was established by the testimony of the "Feltre" pilot (R. 224-226), was a positive violation of the Rules of the Road. Those rules required each vessel to pass to the right (Art. 18, Rule I, Inland Rules; 33 U.S.C. §203; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 100).

4. *The "Feltre" violated the "narrow channel" rule by swinging to her own left across the Upper Cottonwood Island Range* (R. 1421).

The "narrow channel" rule required each vessel to keep to her own right-hand side of the channel (Art. 25, Inland Rules; 33 U.S.C. §210; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 101).

5. The "Feltre" was also found at fault in other respects, in that she proceeded at an immoderate speed, that she failed to allow the "Edward Luckenbach" a safe margin for passing, and that she failed to take any compass bearings of the "Edward Luckenbach" as the two vessels approached each other (R. 1421).

6. The findings established that the vessels came into collision to the *right* of the Upper Cottonwood Island Range, proceeding *upstream*, that is, between the range and a point 300 feet to the *right* of the range (R. 1420). This was *on the "Edward Luckenbach's" proper side of the channel,* and established the "Feltre's" violation of the "narrow channel" rule (Art. 25, Inland Rules (supra)).

The Circuit Court of Appeals also affirmed the decision of fault against petitioner's vessel, the "Edward Luckenbach", but, as the majority opinion shows, the court confined its consideration to the evidence on a single issue, the alleged violation of the "narrow channel" rule, and decided against petitioner's vessel upon evidence that the majority of the court stated was in *"sharp conflict"*, only *"fairly clear"*, merely *"persuasive"*, and that *"may be doubted"*.

The brief majority opinion, without any carefully considered review of the evidence, *shows on its face,* by the express statements of the court, that the evidence against

the "Edward Luckenbach" on the alleged violation of the "narrow channel" rule (the only point considered by the court) was *neither clear nor convincing* nor sufficient to establish fault on the part of that vessel.

The majority of the court stated that:

> "the evidence is in *sharp conflict*" (R. 1421)
>
> * * * * * * *
>
> "In any event it is *fairly clear* that when the vessels collided the Luckenbach was being navigated too close to midchannel" (R. 1424)
>
> * * * * * * *
>
> "However, it *may be doubted* whether the Luckenbach actually crossed the course of the Feltre in the manner testified. It seems rather *more probable*", etc. (R. 1426)
>
> * * * * * * *
>
> "But *whatever may be the fact,* the record as a whole is *persuasive* that the Luckenbach was so far off her proper course", etc. (R. 1426)

There is no statement or finding in the majority opinion that the evidence against the "Edward Luckenbach" was *clear and convincing* or free from doubt, as required under the decisions of this court, nor was there any finding against that vessel based upon such evidence. The majority opinion cited no authority to sustain its decision against the "Edward Luckenbach".

The able dissenting opinion of the senior circuit judge, a Naval Academy graduate with a wide experience over many years in collision cases, reviewed the evidence at length and showed conclusively, with citations of the decisions of this court, that the evidence failed to establish any fault on the part of the "Edward Luckenbach".

In sharp contrast with the statements of *doubt* in the majority opinion, the dissenting opinion concluded, after a careful review of the evidence, that there was "*no clear, convincing proof* that the Luckenbach was in the wrong" (R. 1439-40) and that "the point of collision* is *virtually decisive of the case*" (R. 1435).

Petitioner is applying for a writ of certiorari to review and correct the decision of the Circuit Court of Appeals upon the ground that the decision of the Circuit Court of Appeals, as shown by the majority opinion, was clearly in conflict with the settled law as established by the decisions of this court.

B.

JURISDICTIONAL STATEMENT.

The general jurisdictional facts are set forth in the preceding summary of the matter involved, and show that the instant cause, which arose out of a marine collision upon the navigable waters of the United States, is within the admiralty jurisdiction of the courts of the United States.

The decree of the United States Circuit Court of Appeals for the Ninth Circuit was entered on March 23, 1942 (R. 1461). A timely petition by petitioner for a rehearing was denied by the Circuit Court of Appeals on April 20, 1942 (R. 1461).

The majority opinion of the Circuit Court of Appeals will be found in the record at pages 1416-27, inclusive,

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*On the "Luckenbach's" proper side of the channel.

and the minority opinion at pages 1427-60, inclusive. The opinions will also be found in 127 F. 2d, pp. 86-100 inc. The opinions are also included in the accompanying brief for purpose of argument and for convenient reference by the court.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the *Act of Congress, September 24, 1789, c. 20, §9, 11; 1 Stat. 76, 78; 28 U.S.C. §371.*

The review of the decision of the Circuit Court of Appeals by this court on certiorari is authorized by *Section 240 of the Judicial Code, 28 U.S.C. §347; Acts of Congress: Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938.*

In *Watts, Watts & Co. v. Unione Austriaca, etc.*, 248 U.S. 9, an admiralty cause, this court stated (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. * * * In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton v. United States*, 5 Cranch, 281; *Irvine v. The Hesper*, 122 U.S. 256, 266; *Reid v. American Express Co.*, 241 U.S. 544."

In *Langnes v. Green*, 282 U.S. 531 (1931), a proceeding by a shipowner to obtain a limitation of liability was brought to this court on certiorari. The court reviewed the decisions which establish that on an appeal in admiralty there is a trial *de novo*, and declared the power

of the court on certiorari to review the action of the court of appeals on the whole record. The rule in *Watts, Watts & Co. v. Unione Austriaca, etc.,* (supra) was reaffirmed (282 U.S. 537).

The reports of the decisions of this court show that although opinions in admiralty causes arising out of marine collisions were much more common in earlier years than of late, nevertheless, the court has granted certiorari in recent years in collision causes when it has been deemed necessary to review a decision of a circuit court of appeals.

Wilson v. Pacific Mail Steamship Company, (1928) 276 U.S. 454;

Southern Pacific Company v. Haglund, (1928) 277 U.S. 304;

Postal Steamship Corporation v. El Isleo, (1940) 308 U.S. 378.

C.

THE QUESTIONS PRESENTED.

The exact questions presented by this petition and upon which petitioner bases its application for a review of the decision of the Circuit Court of Appeals can be stated in the language of this court as follows:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a *doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and *any*

> *reasonable doubt* with regard to the propriety of the conduct of such other vessel *should be resolved in its favor.*"
>
> (*The City of New York*, 147 U.S. 72, 85.)

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be *clear and convincing* in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."
>
> (*The Victory & The Plymothian*, 168 U.S. 410, 423.)

The decision of the Circuit Court of Appeals in the instant case, as shown on the face of the majority opinion, was clearly in error and in conflict with the applicable decisions of this court, in that:

1. Although it was clear from the record and from the decision of the District Court, affirmed by the Circuit Court of Appeals, that the fault of the "Feltre" was established by uncontradicted testimony, and was sufficient to account for the collision, the majority of the Circuit Court of Appeals, nevertheless, failed to apply the above rule laid down by this court in *The City of New York* (supra), *The Victory & The Plymothian* (supra), and in numerous other decisions,* which rule required that the evidence must be clear and convincing in order to establish fault on the part of petitioner's vessel. On the contrary, the majority of the court affirmed the decision of fault against petitioner's vessel, the "Edward Lucken-

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*See authorities cited in brief.

bach", upon evidence that the court stated was in "sharp conflict", only "fairly clear", merely "persuasive" and which "may be doubted", and without the court finding any fault against petitioner's vessel based upon *clear and convincing evidence,* as required by the rule.

2. The decision of the Circuit Court of Appeals against petitioner's vessel upon evidence that the majority opinion stated was in "sharp conflict", "fairly clear", merely "persuasive", and "may be doubted", was clearly erroneous and in conflict with the applicable decisions of this court, in view of the undisputed faults of the "Feltre", established by uncontradicted testimony and sufficient to account for the collision.

3. The majority of the Circuit Court of Appeals, in confining its consideration of the case to a single issue on appeal, and in finding against petitioner's vessel on doubtful evidence, as shown by the majority opinion, violated the established principle that a trial *de novo* on an appeal in admiralty requires a full consideration of the evidence by the appellate court in order to arrive at an independent judgment. The able dissenting opinion shows the careful consideration of the evidence that is required on a trial *de novo,* but the majority opinion fails to show such consideration.

4. In view of the lack of *clear and convincing evidence* to establish fault against petitioner's vessel, as is required under the decisions of this court, the interlocutory decree of mutual fault entered by the District Court should have been modified by the Circuit Court of Appeals to exonerate petitioner's vessel, the "Edward Luckenbach", and hold the "Feltre" solely to blame for the collision.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This petition falls within the provisions of Supreme Court Rule 38, subd. 5 (b) in that:

1. The decision of the Circuit Court of Appeals on a federal question arising in an admiralty cause is in direct conflict with the applicable decisions of this court.

2. The decision is also in conflict with decisions of the United States Circuit Courts of Appeal for the Second, Third, Fourth, Sixth, and Ninth Circuits on the same matter.

3. The Circuit Court of Appeals, in rendering the decision in this case, has so far departed from the accepted and usual course of judicial proceedings on a trial *de novo* in an admiralty appeal as to call for this court's power of supervision.

The decisions that are referred to above and elsewhere in this petition are set forth in the accompanying brief.

We have also attached both opinions of the Circuit Court of Appeals in this case, in order that this court may readily contrast the able dissenting opinion of Judge Wilbur with that of the majority of the court.

The dissenting opinion correctly states the law as announced by this court and demonstrates that the majority opinion is clearly against the law.

The opinion of the majority of the Circuit Court of Appeals shows upon its face that the decision of the court was clearly contrary to the settled law as established by the decisions of this court, and shows, furthermore, that in confining its consideration to a single issue, without a

review of the entire body of the evidence in order to arrive at an independent judgment, the Circuit Court of Appeals failed to determine the appeal according to the principles of a trial *de novo* that govern in admiralty appeals.

Upon the foregoing grounds and in order to correct a decision that is manifestly unjust to petitioner, unsupported by the record and contrary to the settled law, your petitioner respectfully prays that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to send to this court for its review and adjudication, the record and proceedings in the above entitled cause.

San Francisco, California,
June 8, 1942.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

I. OPINIONS OF THE CIRCUIT COURT OF APPEALS.

The majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit will be found in the record at pages 1416-27, and the dissenting opinion at pages 1427-60, inc. The opinions will also be found in 127 F. 2d, 86-100, inc. No opinion was rendered by the District Court.

The majority opinion of the Circuit Court of Appeals is reviewed at length in this brief, and the dissenting opinion is set forth in the Appendix.

II. JURISDICTIONAL STATEMENT.

In Section B of the accompanying petition is set forth a jurisdictional statement in compliance with Rule 38, par. 2, and Rule 12, par. 1, of this court. The statement refers to the statutory provisions that sustain the jurisdiction of this court, and shows the date of the decree of the Circuit Court of Appeals, the date of the denial of a petition for rehearing, the nature of the case, and the rulings of this court that bring the case within the jurisdictional provisions relied upon.

In the interest of brevity, petitioner refers to said jurisdictional statement and incorporates the same herein by such reference, without repeating the statement at length herein.

III. STATEMENT OF THE CASE.

A statement of that portion of the case that is material to the consideration of petitioner's application for a writ of certiorari is set forth in Section A of the accompany-

ing petition, to which statement, for the sake of brevity, reference is hereby made.

The general facts with respect to the collision are set forth in the majority opinion of the Circuit Court of Appeals which is analyzed in Section V of this brief, entitled "Argument". Any additional facts that may be deemed necessary to a consideration of the petition will be called to the attention of the court in connection with the analysis of the opinion.

IV. ASSIGNMENT OF ERRORS.

1. In view of the facts that: (a) the clear fault of the "Feltre" was established by uncontradicted testimony and found by the District Court and affirmed by the Circuit Court of Appeals, which fault was of itself sufficient to account for the collision with petitioner's vessel, the "Edward Luckenbach", that occurred in the Columbia River on February 17, 1937; (b) on the single issue considered by the court, viz.: the alleged violation of the "narrow channel" rule, the evidence against petitioner's vessel, according to the express statement of the majority of the court, was in "sharp conflict", only "fairly clear", merely "persuasive", and "may be doubted"; and (c) the Circuit Court of Appeals made no finding of fault against petitioner's vessel based on clear and convincing evidence; the Circuit Court of Appeals erred in affirming the decision of fault against petitioner's vessel with respect to the collision.

2. The Circuit Court of Appeals erred in not finding and holding, for the reasons set forth in the preceding

assignment, that the interlocutory decree of the District Court should be modified and the "Feltre" held solely to blame for the collision.

3. The majority of the Circuit Court of Appeals erred in failing and refusing to consider the whole body of the evidence as required on a trial *de novo* in admiralty in order to reach an independent judgment in the case; and in confining its consideration to a single issue, and in finding against petitioner's vessel on that issue on evidence that the court stated was in "sharp conflict", only "fairly clear", merely "persuasive", and "may be doubted".

4. The majority of the Circuit Court of Appeals erred in rendering a decision against petitioner's vessel, the "Edward Luckenbach", in direct conflict with the settled law as established by the decisions of this court.

V. ARGUMENT.

SUMMARY OF ARGUMENT.

1. The majority opinion of the Circuit Court of Appeals shows that the court was clearly in error in affirming the decree of fault against petitioner's vessel.
2. The majority opinion shows that the pilot of the "Edward Luckenbach" was an experienced Columbia River pilot.
3. The majority opinion confirms the findings of the Commissioner and the District Court that the collision occurred on the "Edward Luckenbach's" side of the channel.

4. The opinion of the majority of the court shows that they considered the case on the erroneous assumption that the evidence against both vessels was in sharp conflict.

5. The majority opinion confirmed the finding that the collision occurred in a narrow channel.

6. The majority of the court failed to review the whole body of the evidence in order to arrive at an independent judgment, as required on a trial *de novo*.

7. The testimony regarding the position of the "Edward Luckenbach" in the channel at the bend of the river, at the time the vessels sighted each other, was conflicting, according to the majority opinion, and, in any event, the location of the "Edward Luckenbach" at that time was immaterial and had no bearing on the collision.

8. The majority opinion shows that the "Feltre's" lack of a lookout was the proximate cause of the collision.

9. The majority opinion shows that the "Feltre", instead of stopping, reversing, and sounding the danger signal, continued on her course and turned to the left, in violation of the Inland Rules, without the consent of the "Edward Luckenbach".

10. Although the location of the collision on the "Edward Luckenbach's" side of the channel was established by the undisputed findings of the Commissioner and the District Court, the majority opinion, without support in the record, states erroneously that the location was unclear.

11. The majority opinion shows that there was no clear and convincing evidence to establish the alleged violation by the "Edward Luckenbach" of the "'narrow channel" rule as required by the decisions of this court.

12. The testimony of the "down-river" witnesses regarding the alleged position of the "Edward Luckenbach" in the bend of the river, below the location of the collision, was immaterial, as that testimony had no relation to the collision.

13. The majority of the court stated that the Conway chart (Conway Ex. 1, R. 1335), which was shown by the dissenting opinion to be utterly worthless, was not appraised by the court and was given little consideration in evaluating the testimony; but the majority opinion shows, nevertheless, that the Conway chart was used to locate the "Edward Luckenbach" on the wrong side of the channel.

14. The intimation in the majority opinion that the "Edward Luckenbach" pilot's method of navigation was negligent is refuted by the record and by the recognized authority.

15. The majority opinion shows clearly that the court rejected the "Feltre" pilot's version of the collision, and shows further that the evidence against the "Edward Luckenbach" was doubtful.

16. The failure of the majority of the court to appraise the value of the Conway chart confirms the conclusion in the dissenting opinion that the Conway chart should be entirely disregarded and that it was utterly worthless.

17. The majority and minority opinions agree that the "Feltre" testimony against the "Edward Luckenbach" should be rejected.

1. **THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS SHOWS THAT THE COURT WAS CLEARLY IN ERROR IN AFFIRMING THE DECREE OF FAULT AGAINST PETITIONER'S VESSEL.**

The decree of the Circuit Court of Appeals was entered "in accordance with the majority opinion" (R. 1416). It is necessary, therefore, to analyze the majority opinion in order to ascertain the basis for the decision against the "Edward Luckenbach".

Petitioner's petition for a writ of certiorari is based upon grounds that are apparent on the face of the majority opinion. In order to emphasize to this court the reasons why the writ should be granted, the majority opinion is inserted herein with petitioner's comments relative to the points that are essential to a consideration of the petition.

The majority opinion is as follows:

"OPINION

Before: Wilbur, Haney and Healy, Circuit Judges.

HEALY, Circuit Judge.

"On February 17, 1937 the American steamer Edward Luckenbach and the Italian motorship Feltre collided in the Columbia river at a point about four miles above Longview, Washington. As a result of the collision the Feltre sank to her main deck in the channel. She was thereafter libeled by cargo owners and sold under process.

"Subsequent to the collision the owner and operator of the Feltre filed a libel in the court below against the Edward Luckenbach and her owner requesting damages sustained in the loss of the ship and her cargo. The owner of the Luckenbach thereupon petitioned for exoneration from or limitation of liability. There were claims and answers in the limitation proceeding on the part of the Feltre and cargo claimants. A special master was appointed by the court to hear and report on all issues of fact and law involved. The master, determining that the owner of the Luckenbach was entitled to limit its liability, found that both vessels were at fault. Exceptions were taken to the findings of the master, but these were approved by the court and all parties save the cargo claimants have appealed. The sole question presented is the responsibility for the collision.

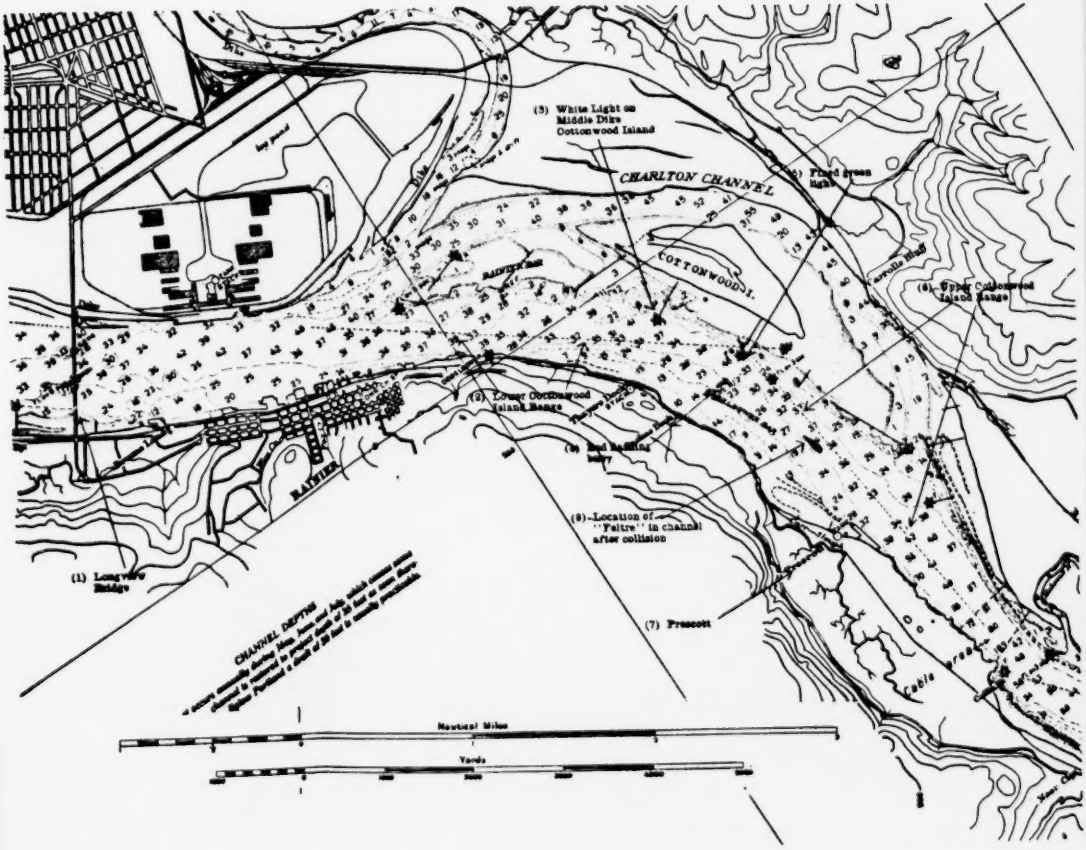
"The Edward Luckenbach is a steam turbine vessel 457 feet long and with a beam of 57 feet. At the time of the collision her forward draft was 14 feet 6 inches and her aft draft 18 feet 6 inches." (R. 1416-17)

2. THE MAJORITY OPINION SHOWS THAT THE PILOT OF THE "EDWARD LUCKENBACH" WAS AN EXPERIENCED COLUMBIA RIVER PILOT.

The opinion states:

"She was proceeding, partly loaded, up the Columbia toward Portland in charge of Captain McNelly, an *experienced, licensed* Columbia river pilot." (R. 1417) (Emphasis in quotations supplied.)

This fact was found by the Commissioner (R. 213) and was not excepted to (R. 278-88), nor was any error assigned with respect to said finding (R. 342-54). The


(3) White Light on Middle Dike Cottonwood Island
CHARLTON CHANNEL
(4) Fixed green light
COTTONWOOD I.
(5) Upper Cottonwood Island Range
(2) Lower Cottonwood Island Range
(8) Location of "Feltre" in channel after collision
(1) Longview Bridge
(7) Prescott
CHANNEL DEPTHS
Nautical Miles
Yards

statement in the majority opinion that the pilot of the "Edward Luckenbach" was an *experienced, licensed Columbia river pilot,* is significant in view of the later suggestion (R. 1425-6), without any basis in the record as we will show, that the pilot may have been negligent.

The majority opinion continues as follows:

> "The Feltre, a vessel about 460 feet in length with a beam of 55 feet, was powered by means of a Burmeister diesel engine. She carried a cargo of 3500 tons. She was proceeding down the river from Portland in charge of Captain Turppa, an experienced, licensed Columbia river pilot.
>
> "A copy of the government chart of the vicinity is incorporated as an aid to a proper understanding of the discussion which follows. We will refer to the points indicated on the chart without further explanation. As the chart appears here the meridian line is at an angle of about 45° with the vertical.
>
> "The findings are in substance these: The collision occurred between 1:40 and 1:41 A.M. Prior to and at the time of the impact the wind was estimated to be blowing from 25 to 60 miles per hour from a south south-easterly direction, or approximately down the Upper Cottonwood Island Range, striking the Feltre astern and the Luckenbach on her starboard bow as the vessels approached each other. Visibility was good, although it was raining, and was estimated by witnesses to be from 3 to 6 miles. The tide was ebb and was running against the Luckenbach; and the set of the tide and current was toward the Washington side of the river. The current was running at a speed of about 2 knots per hour. The vessels sighted each other when the Luckenbach was below the red

flashing buoy on Dobelbower Bar and the Feltre was about Prescott.

"The Columbia river in the general vicinity is a narrow channel within the meaning of Art. 25 of the Inland Rules and said article was applicable to the navigation of both vessels in approaching and passing each other.

"Both vessels had been proceeding with engines at full speed ahead for some time prior to the collision and both vessels continued at that speed until the impact. The speed of the Luckenbach was about 7.77 knots and that of the Feltre was about 12 knots, over the ground. The vessels collided at a *sharp angle,* the stem of the Luckenbach striking the Feltre on her starboard side at No. 2 hatch and ripping off a considerable section of the Feltre's plating, as a result of which the Feltre sank." (R. 1417-20)

3. THE MAJORITY OPINION CONFIRMS THE FINDINGS OF THE COMMISSIONER AND THE DISTRICT COURT THAT THE COLLISION OCCURRED ON THE "EDWARD LUCKENBACH'S" SIDE OF THE CHANNEL.

The opinion states:

"The collision occurred at a point between the upper end of Cottonwood Island and the lower end of Prescott dock, and, with respect to the channel, occurred between the Upper Cottonwood Island Range and a point 300 feet to the *right* thereof, proceeding *upstream.*" (R. 1420)

This statement by the majority of the court regarding the location of the collision to the *right* of the Upper Cottonwood Island Range proceeding *upstream* agrees with the findings of the Commissioner (R. 244-5) and the Dis-

trict Court (R. 293), and fixes the location of the collision on the *"Edward Luckenbach's" proper side of the channel.* The location of the "Feltre" in the channel after the collision is shown on the chart inserted in the majority opinion (R. 1418) and also inserted herein.

In the dissenting opinion, Judge Wilbur stated "the point of collision is virtually decisive of the case" (R. 1435).

The majority opinion continues as follows:

> "The collision and the resulting damage to both vessels and to the cargo carried on the Feltre was found to be due to and caused by the negligent navigation and faults of both vessels in the particulars now to be stated.
>
> "The navigational faults of the Luckenbach contributing to and causing the collision were, (1) she violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range; (2) she failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions; (3) she proceeded at an immoderate rate of speed for the conditions prevailing; (4) she failed, in a channel of ample width to enable vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre; and, (5) she failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing.
>
> "As for the Feltre, the findings are that she was guilty of negligent navigation contributing to and causing the collision in that, (1) she did not have a proper lookout, no lookout being stationed in the bow

of the ship and no member of the watch being stationed elsewhere for the sole purpose of acting as lookout; (2) she failed to sound the danger signal and failed to stop and reverse as required by the attendant conditions; (3) she sounded a two-blast signal and altered her course to her own left before the Luckenbach assented; (4) she violated the narrow channel rule by swinging to her own left across the Upper Cottonwood Island Range; (5) she proceeded at an immoderate rate of speed for the conditions prevailing; (6) she failed, in a channel of ample width, to allow the Luckenbach a safe margin for passing; and (7) she failed to take any compass bearing of the Luckenbach as the two vessels approached each other, a precaution which would have permitted her to observe a safer margin in passing." (R. 1420-21)

The foregoing is a recital of the findings against the vessels by the District Court. The majority of the Circuit Court of Appeals, in considering the navigation of the "Edward Luckenbach", as we will show, confined its discussion to a single point, namely, the alleged violation of the "narrow channel" rule.

4. THE OPINION OF THE MAJORITY OF THE COURT SHOWS THAT THEY CONSIDERED THE CASE ON THE ERRONEOUS ASSUMPTION THAT THE EVIDENCE AGAINST BOTH VESSELS WAS IN SHARP CONFLICT.

The opinion states:

> "We see no sufficient reason for disturbing these findings. While the evidence is in *sharp conflict* the weight of it appears to us to require an affirmance." (R. 1421)

This statement of the majority of the court with reference to the findings of fault against *both vessels* was clearly erroneous and demonstrates that the appellate court failed to review the whole body of the evidence as required on a trial *de novo* in admiralty. The record shows clearly that there was no "sharp conflict" in the evidence that established fault on the part of the "*Feltre*", but, on the contrary, the faults of the "Feltre" were established by the uncontradicted testimony of her own witnesses. The Commissioner's report quotes the "Feltre" testimony that established that the vessel had no lookout (R. 216), that she failed to stop and reverse and to sound the danger signal (R. 220-2), that she sounded a two-blast signal and changed her course to the left without the consent of the "Edward Luckenbach" (R. 224-6), and that she proceeded at an immoderate speed although her pilot admitted that she "had no backing power worth anything, practically" and that she was a "miserable vessel to handle" (R. 227).

The majority of the court, in finding that the evidence was "in sharp conflict", and in ignoring the fact that there was *no conflict in the testimony regarding the faults of the "Feltre"*, failed to consider the navigation of the "Edward Luckenbach" in the light of the presumption in favor of that vessel which resulted from the clear finding of fault against the "Feltre", established by uncontradicted testimony and sufficient to account for the collision.

In marked contrast, the dissenting opinion of Judge Wilbur stated (R. 1439-40):

> "It is enough to say that the evidence indicates a clear fault on the part of the Feltre in leaving her

side of the channel with no clear, convincing proof that the Luckenbach was in the wrong;[3] on the contrary, the circumstantial evidence and the quoted testimony given by pilot and wheelsman of the Feltre corroborates the testimony of the Luckenbach that she was at all times on her own side of the channel and that the collision resulted from the action of the Feltre in leaving her side of the channel".

"[3]'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.' The City of New York, 147 U.S. 72, 85.

'As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.' The Victory and The Plymothian, 168 U.S. 410, 423."

The record shows, furthermore, that, with respect to the "Edward Luckenbach", the only issue on which there was any *conflict* in the testimony was in regard to the alleged violation of the "narrow channel" rule, (quoted in majority opinion) and that as to the other alleged faults there was no evidence whatsoever. The exceptions filed by petitioner to the report of the Commissioner (R. 255-60) point out the entire lack of any evidence that

had any tendency to sustain the findings of alleged fault against the "Edward Luckenbach" on all issues except the alleged violation of the "narrow channel" rule, and as to that issue, the exceptions (R. 251-55) point out the error in finding against that vessel.

Petitioner assigned as error on appeal each of the foregoing findings against the "Edward Luckenbach" (R. 304-13).

The majority of the court were therefore clearly in error in deciding the case on the assumption that there was a "sharp conflict" in the evidence with respect to both vessels, which assumption deprived the "Edward Luckenbach" of the benefit of the presumption resulting from the clear fault of the "Feltre" established by uncontradicted testimony.

5. THE MAJORITY OPINION CONFIRMED THE FINDING THAT THE COLLISION OCCURRED IN A NARROW CHANNEL.

The opinion states:

> "We agree that the narrow channel rule is applicable.[1]

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[1] "Art. 25. 'In narrow channels every steam vessel shall, when it is safe and practicable, keep on that side of the fairway or mid-channel which lies on the starboard side of such vessel.' 33 U.S.C.A. §210." (R. 1421)

The finding that the collision occurred in a narrow channel, within the meaning of the Inland Rules, es-

tablishes the clear fault of the "Feltre" in crossing to the wrong side of the channel.

6. THE MAJORITY OF THE COURT FAILED TO REVIEW THE WHOLE BODY OF THE EVIDENCE IN ORDER TO ARRIVE AT AN INDEPENDENT JUDGMENT, AS REQUIRED ON A TRIAL *DE NOVO*.

The opinion states:

> "Whether each vessel was guilty of all of the faults attributed to it *we need not inquire*, since it is *clear* that each was guilty of *one or more serious navigational* faults contributing to the collision." (R. 1421)

The majority opinion fails to show, however, as we will point out, that the "Edward Luckenbach" was guilty of "one or more serious navigational faults".

7. THE TESTIMONY REGARDING THE POSITION OF THE "EDWARD LUCKENBACH" IN THE CHANNEL AT THE BEND OF THE RIVER, AT THE TIME THE VESSELS SIGHTED EACH OTHER, WAS CONFLICTING, ACCORDING TO THE MAJORITY OPINION, AND, IN ANY EVENT, THE LOCATION OF THE "EDWARD LUCKENBACH" AT THAT TIME WAS IMMATERIAL AND HAD NO BEARING ON THE COLLISION.

The majority opinion states:

> "When the vessels sighted each other they were well over a mile, perhaps a mile and a half, apart. In the vicinity of the collision that portion of the channel having a depth of 19 feet or more was over 2000 feet wide, and the width of the deep water channel—30 feet or more in depth—was in the neighborhood of 1000 feet. While those on board her deny

> it, the Luckenbach, when first sighted by the Feltre, was on the Washington side of the channel and continued on that side at least for several minutes thereafter." (R. 1421-22)

At the time when the two vessels sighted each other, they were, according to the court's statement (R. 1421), "well over a mile, perhaps a mile and a half apart", and their respective positions were immaterial. Judge Wilbur said in the dissenting opinion:

> "The course traversed by the Luckenbach up to the time the two vessels sighted one another when one and one-half miles distant is entirely immaterial." (R. 1443)

In the majority opinion, the court does not refer to any evidence in support of the statement that the "Edward Luckenbach" "continued on that side at least for several minutes thereafter" (R. 1422). Furthermore we will show hereinafter that the majority of the court expressly rejected the testimony of the "Feltre" witnesses and the Conway chart (Conway Ex. 1., R. 1335), which was the only evidence that would lend support to the foregoing statement in the majority opinion.

In the dissenting opinion, however, the evidence that related to the position of the "Edward Luckenbach" in the channel, was reviewed at length, and Judge Wilbur stated (R. 1440):

> "* * * the circumstantial evidence and the quoted testimony given by pilot and wheelsman of the Feltre corroborates the testimony of the Luckenbach that she was at all times *on her own side of the*

channel and that the collision resulted from the action of the Feltre in leaving her side of the channel."

8. THE MAJORITY OPINION SHOWS THAT THE "FELTRE'S" LACK OF A LOOKOUT WAS THE PROXIMATE CAUSE OF THE COLLISION.

The majority opinion states:

> "On her part, the Feltre had *no lookout* in the bow of the vessel, and the lookout on the bridge had other duties to perform. The Feltre saw the range lights and the starboard colored light of the Luckenbach on her port bow and in a short time blew one whistle to indicate a port-to-port passing. This was answered by an assenting blast from the Luckenbach, *but the answering whistle was not heard on the Feltre. Had a proper lookout been maintained it is entirely possible that the answering signal would have been heard,* and the confusion thereafter arising in the mind of Pilot Turppa as to the purpose of the Luckenbach would have been to an extent obviated." (R. 1422)

This statement in the majority opinion shows the clear fault of the "Feltre" in not maintaining a lookout, and shows, furthermore, that the lack of a lookout caused the collision. It shows also that the "Edward Luckenbach" complied with the Rules of the Road by answering the "Feltre's" one-blast signal.

The entire case against the "Edward Luckenbach" depended on her navigation *after the two vessels exchanged the one-blast passing signals* at a distance of a mile to a mile and one-half apart.

The "Feltre" pilot claimed that the "Edward Luckenbach" thereafter held a steady course and crossed the Upper Cottonwood Island Range and the course of the "Feltre", thereby causing that vessel to execute a left-hand maneuver one-half minute before the collision. This version of the "Feltre's" pilot was "doubted" by the majority of the Circuit Court of Appeals (R. 1426), and was refuted by the review of the evidence in the dissenting opinion (R. 1435-38).

The "Luckenbach" testimony established that upon the exchange of one-blast signals the vessel's course was changed to the *right,* and this change was confirmed by the record of her gyro compass which recorded automatically the vessel's headings by compass. In the majority opinion the compass record was referred to as follows:

> "At 1:38 A. M. her compass course changed to 176° and at 1:39 it was 188.5°. At 1:40, almost at the moment of the collision, her course was 180.5°." (R. 1425)

The change to 176° from the previous course of 155.5° (R. 1425) involved a change of 20.5° to the *right,* and the further swing to 188.5° involved a change of 12.5° to the right, and establishes that the "Edward Luckenbach" changed her course to the *right* a total of 33°, commencing at 1:38 A. M., *three minutes before the collision.*

This positive physical evidence corroborated the "Luckenbach" testimony and was opposed only by the "Feltre" testimony which the Circuit Court of Appeals "doubted" and which the dissenting opinion (R. 1452) stated was

"so at variance with established facts as to be altogether unreliable".

9. THE MAJORITY OPINION SHOWS THAT THE "FELTRE", INSTEAD OF STOPPING, REVERSING, AND SOUNDING THE DANGER SIGNAL, CONTINUED ON HER COURSE AND TURNED TO THE LEFT, IN VIOLATION OF THE INLAND RULES, WITHOUT THE CONSENT OF THE "EDWARD LUCKENBACH".

The majority opinion states:

> "As the vessels neared each other, *according to Pilot Turppa* and others aboard the Feltre, the Luckenbach crossed the Upper Cottonwood Range and blotted out the range lights. At that time the Feltre sounded a *two-blast whistle,* and simultaneously her course was directed to the *left.* Shortly after the two-blast whistle the vessels collided at a sharp angle. Neither vessel stopped her engines until almost the instant of collision." (R. 1422)

The foregoing reference to Pilot Turppa's version that the "Edward Luckenbach" crossed the upper range, will be considered hereafter in connection with the comment by the majority of the court that it "may be doubted" whether Turppa's version was correct.

The majority opinion continues:

> "Prior to sounding the two-blast whistle and making the left swing, the Feltre had been guided, not by means of a compass, but by two shore lights marking the Upper Cottonwood Island Range. This is a proper course to be used by vessels going downstream, and it is not disputed that the Feltre *continued on that course* until the two-blast whistle was

sounded.[2] In the neighborhood of the collision this range is well to the right of mid-channel on the Washington side of the river.

* * * * * * *

[2]"All witnesses who mention the subject seem to agree on this. For example, Captain Murphy of the Luckenbach testified that he was watching the Feltre prior to the two-blast signal, that she appeared to be coming right down her range as she had been going; that he observed her masthead light, range light, and red side light on her port bow; that when she blew the two-blast signal he observed that 'her red light started to swing to her left, . . . then both side lights came into view, the masthead light and range lined up, and the red light went out of sight and the green light came in full view'." (R. 1422-23)

An examination of the chart that is inserted in the majority opinion (R. 1418) and also in this brief, will show that the Upper Cottonwood Island Range opposite the location of the "Feltre" in the channel, is approximately in the *center* of the deep water channel and not "well to the right of mid-channel", as stated in the majority opinion. The chart shows, furthermore, that the location of the "Feltre" is near the edge of the channel and *well to the right* of the range looking *upstream* toward the right-hand side of the chart.

10. **ALTHOUGH THE LOCATION OF THE COLLISION ON THE "EDWARD LUCKENBACH'S" SIDE OF THE CHANNEL WAS ESTABLISHED BY THE UNDISPUTED FINDINGS OF THE COMMISSIONER AND THE DISTRICT COURT, THE MAJORITY OPINION, WITHOUT SUPPORT IN THE RECORD, STATES ERRONEOUSLY THAT THE LOCATION WAS UNCLEAR.**

The majority opinion states:

"While the master was of opinion that, as a result of her left swing, the Feltre actually passed over

> from her right side of the channel and into the Luckenbach's side of the river, the precise point of the collision is *unclear*. Divers found the Feltre's strong backs from No. 3 hatch on the bottom of the river about 15 feet from the starboard side of the Feltre and 55 feet upstream, and anchor flukes of the Luckenbach which were broken off by a boat davit on the Feltre were also found in the same relative position." (R. 1423)

The Commissioner and the District Court made definite findings regarding the location of the collision on the "Edward Luckenbach's" side of the channel, and the majority of the court referred to those findings earlier in the majority opinion (R. 1420). Although those findings with respect to the location of the collision were not excepted to (R. 278-88) nor assigned as error on appeal (R. 342-54), the majority of the court now states that the precise point of collision is "unclear".

In the dissenting opinion, Judge Wilbur reviewed the evidence and concluded that the place of collision was established by the wreckage on the bottom of the river (R. 1434).

The majority opinion continues as follows:

> "From these physical facts the Luckenbach insists that the Feltre sank practically in the same spot as that at which the collision occurred. However, *the master and the trial court accepted the testimony of Pilot Turppa* that the Feltre did not sink immediately, but came to rest on the bottom in about her own length, or about 450 or 500 feet. There are good reasons for believing that the estimate approximates the truth. A watchman and an oiler, who

> were in the engine room of the Feltre at the time of the collision, *had ample time in which to go from the engine room to the deck* after the crash occurred. It may well be that the wreckage did not drop into the water until the vessels became separated." (R. 1423-24)

In the foregoing excerpt from the majority opinion, there are three statements that are refuted by the record, as follows:

(a) In neither the findings of the District Court (R. 289-95), nor in the Commissioner's report (R. 237-8), is there any reference to the adoption of Captain Turppa's testimony regarding the movement of the "Feltre" as stated in the majority opinion (R. 1424).

In regard to the actual location of the collision, the Commissioner referred to the physical evidence, namely, the finding of the strongbacks and anchor flukes on the river bottom, and he also mentioned the testimony of Captain Turppa, referred to in the majority opinion, that the "Feltre" sank in about her own length (R. 237). The Commissioner then stated (R. 238):

> "* * * it is the feeling of your Special Master that the Feltre, after blowing the two-blast signal and directing its course to her own left actually *crossed over the center of the channel,* even though the swinging to the left would not commence immediately upon the hard left rudder."

The Commissioner said also (R. 226-7):

> "Suffice it to say, at this time, that it is the opinion of the Special Master that the Feltre in directing her own course to the left actually passed over

from her right side of the channel and *into the Luckenbach's side of the channel.* Manifestly, this invasion of the Luckenbach's side of the channel was an infraction of said 'Inland Rule'. Vide:

Screw Collier v. Webster, L.R. (1910) App. Cas. 165

The Florence, 186 F. 57 at 62".

(b) The statement in the majority opinion that a watchman and an oiler in the "Feltre's" engine room "had *ample* time to *go from the engine room to the deck*" (R. 1424), finds partial support in the statement in the Commissioner's report that the men had ample time "to *escape* from the engine room", but is refuted by the testimony of the two witnesses.

Federico Giraldi testified as follows (R. 957-8):

"A. And then at the same moment, immediately after he put the engine to Stop, there was this crash and the water flooded the engine room.

Q. Do you know anything more about the collision than that?

A. No, all I know, that *we ran away as fast as we could, because in a few seconds the engine room was all filled with water.*"

Aniello Balzano testified as follows (R. 958-9):

"A. I had just come out of the tunnel on my usual tour of inspection of the shaft when the crash came, and immediately after this mass of water came into the engine room I went over to the throttle where the mechanic and the Second Engineer was standing, and then after that I got out just as quickly as I could.

Q. Do you know anything about the collision besides that?

A. Well, I only know that when the water was in the engine room we remained in the dark and *in a few seconds the water had reached up, oh, to our head, and I got out the best I could.*"

It will be seen that the testimony of neither witness supports the statement in the majority opinion that the men had "ample time in which to go from the engine room to the deck after the crash occurred" (R. 1424).

(c) In the majority opinion it is stated that "it may well be that the wreckage did not drop into the water until the vessels separated" (R. 1424). This surmise was answered by the undisputed evidence that the vessels came together "at a sharp angle" and did not swing together so as to hold any broken wreckage suspended. The majority opinion had previously stated that "the vessels collided at a sharp angle" (R. 1419), which statement agrees with the Commissioner's report (R. 213), and with the findings of the District Court (R. 292). There is no basis in the record for the suggestion that the wreckage did not drop into the water immediately.

11. THE MAJORITY OPINION SHOWS THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE TO ESTABLISH THE ALLEGED VIOLATION BY THE "EDWARD LUCKENBACH" OF THE "NARROW CHANNEL" RULE AS REQUIRED BY THE DECISIONS OF THIS COURT.

The majority opinion states:

"In any event it is *fairly clear* that when the vessels collided the Luckenbach was being navigated too close to mid-channel to permit of a safe margin of

passing, and this despite the obvious fact that the channel was of ample width to allow ships to pass without at all crowding each other. No other vessels were in the vicinity to complicate the situation." (R. 1424)

The foregoing excerpt shows that the majority of the court, who had previously stated that the precise point of collision was "*unclear*", without support from the record, now states that "In any event it is *fairly clear*" that at the *time of collision* the "Edward Luckenbach" was too close to mid-channel.

The location of the "Feltre", as shown on the chart inserted in the majority opinion (R. 1418) and in this brief, shows, however, that the "Feltre" had ample room to pass (300 feet at least) if she had continued down the upper range and had not changed her course to the left in violation of the Rules of the Road.

12. THE TESTIMONY OF THE "DOWN-RIVER" WITNESSES REGARDING THE ALLEGED POSITION OF THE "EDWARD LUCKENBACH" IN THE BEND OF THE RIVER, BELOW THE LOCATION OF THE COLLISION, WAS IMMATERIAL, AS THAT TESTIMONY HAD NO RELATION TO THE COLLISION.

The majority opinion states as follows:

"A chief dispute concerns the position of the Luckenbach at the time she passed between the fixed green light and the flashing red buoy *near the bend* of the river. The channel at this point from light to light is about 1000 feet wide. Pilot McNelly, Captain Murphy, and others on board the Luckenbach say she passed close to the red buoy, estimating the

distance to be 100 to 150 feet. Pilot Turppa and another witness aboard the Feltre testified that the Luckenbach passed much closer to the green light on the Washington side than to the red light opposite. Disinterested witnesses aboard vessels coming upstream in the rear of the Luckenbach corroborate the Feltre. Captain Stayton, a Columbia pilot who was navigating a vessel upstream *about a mile and a half astern* of the Luckenbach, testified that at the time the latter passed between the red blinker and the green light he could see that she was nearer the green light. He estimated her place in the channel as about one-third of the distance from the green light and about two-thirds from the red light. The pilot and a watchman on a river tug bound upstream *some distance below the vessel navigated by Captain Stayton,* both say that the Luckenbach passed much closer to the green light than to the red blinker. If this testimony be true—and we see no persuasive reason for discarding the statements of these disinterested and competent witnesses—it places the Luckenbach well to the Washington side of the channel *at the time of her passage between these lights.*" (R. 1424-25)

The evidence that was under consideration related to the position of the "Edward Luckenbach" *when opposite the red buoy in the bend of the river, downstream from the collision,* before the vessels had exchanged one-blast passing signals. This point is clearly apparent from the foregoing excerpt and from the testimony referred to, and is further shown by the chart (R. 1418). Whether the testimony of the "down-river" witnesses should be accepted, as stated in the majority opinion, or should be disregarded, as the senior Circuit Judge concluded after

a detailed review of the testimony, it stands undisputed, and the record shows clearly, that the testimony related solely to the alleged position of the "Edward Luckenbach" at the time she rounded the red buoy *down in the bend* below the locality of the collision. The majority opinion refers specifically to the testimony as fixing the vessel's position "at the time of her passage between these lights" (R. 1425).

In the dissenting opinion it is stated (R. 1443):

> "The course traversed by the Luckenbach up to the time the two vessels sighted one another one and one-half miles distant is entirely immaterial."

13. THE MAJORITY OF THE COURT STATED THAT THE CONWAY CHART (CONWAY EX. 1, R. 1335), WHICH WAS SHOWN BY THE DISSENTING OPINION TO BE UTTERLY WORTHLESS, WAS NOT APPRAISED BY THE COURT AND WAS GIVEN LITTLE CONSIDERATION IN EVALUATING THE TESTIMONY; BUT THE MAJORITY OPINION SHOWS, NEVERTHELESS, THAT THE CONWAY CHART WAS USED TO LOCATE THE "EDWARD LUCKENBACH" ON THE WRONG SIDE OF THE CHANNEL.

The majority opinion states:

> "The course (approximately 155.5°) which she thereafter steered for a space of about 4 minutes continued to carry her obliquely toward the line of the Upper Cottonwood Range and on the wrong side of the channel. At 1:38 A.M. her compass course changed to 176° and at 1:39 it was 188.5°. At 1:40, almost at the moment of the collision, her course was 180.5°." (R. 1425)

The evidence on behalf of the "Feltre" that was opposed to the "Luckenbach" testimony regarding the nav-

igation of the "Edward Luckenbach" from the red buoy up to the place of collision, consisted of, first, the testimony of Pilot Turppa and the other "Feltre" witnesses who corroborated Turppa's version, and, second, the testimony of Captain Conway, an expert who plotted a theoretical course of the "Edward Luckenbach" from her gyro compass record, without allowance for corrections due to tide, wind, current, etc. (Conway Ex. 1; R. 1335).

If Turppa's testimony and Conway's testimony are both to be disregarded, as the majority opinion shows, there was nothing left of the case against the "Edward Luckenbach".

The Commissioner's report shows that he adopted the Conway theoretical plot as establishing that the "Edward Luckenbach" steered a course upstream from the red buoy that carried the vessel across the upper range, and that his finding that the "Edward Luckenbach" violated the "narrow channel" rule was based solely on the Conway plot (R. 234, 239).

The foregoing excerpt from the majority opinion shows that the court likewise *adopted the Conway theoretical plot* to place the vessel "on the wrong side of the channel", notwithstanding that the majority of the court stated that it would not undertake to appraise the value of the Conway chart and that the court had given it little consideration (R. 1427).

The compass courses and the times set forth in the foregoing excerpt are the corrected courses and times obtained from the gyro compass record, and the court therefore must have followed the Conway track in order to

locate the vessel on the wrong side of the channel. There was *no other evidence* on which the court could base the foregoing statement in the majority opinion.

This point will be considered further in connection with the statement of the majority of the court regarding the Conway plot.

14. THE INTIMATION IN THE MAJORITY OPINION THAT THE "EDWARD LUCKENBACH" PILOT'S METHOD OF NAVIGATION WAS NEGLIGENT IS REFUTED BY THE RECORD AND BY THE RECOGNIZED AUTHORITY.

The majority opinion states:

> "As she proceeded up the river the Luckenbach had been navigated entirely *by compass.* It is plain that wind, tide and current had all tended to set her toward the Washington shore; and *it is to be gathered* that her pilot failed for a time to realize his position and that he attempted tardily to correct it by a hard turn to the right." (R. 1425-26)

The majority of the court does not specify the evidence from which "it is to be gathered" that the pilot of the "Edward Luckenbach" navigated the vessel as stated in the foregoing excerpt.

The suggestion that there was something erroneous in steering compass courses is refuted by Bowditch's *American Practical Navigator* (1917 Ed.) wherein it is stated (p. 69):

> "The ship should ordinarily *steer exact courses* and follow exact lines as planned from the chart, changing course *at exact points,* and, where the distances are considerable, her position on the line should be checked at frequent intervals, recording the time and

the reading of the patent log. This is desirable, even where it may seem unnecessary for safety; because, *if running by the eye alone* and the ship's exact position be suddenly required, as in a sudden squall, fixing at that particular moment might be impossible.

"The habit of running *exact courses* with precise changes of courses will be found most useful when it is desired to *enter port or pass through inclosed waters during fog by means of the buoys;* here safety demands that the buoys be made successively, to do which requires, if the fog be dense, *very accurate courses* and careful attention to the times, rate of speed, and the set of the current."

The Columbia river pilots who testified on behalf of the "Feltre" also customarily used compass courses (Turppa, R. 1047; Stayton, R. 1138-40).

Furthermore, the statement in the majority opinion, which appears to be a mere surmise, is hardly in agreement with the earlier statement in the opinion that Captain McNelly, the Luckenbach pilot, was "an experienced, licensed Columbia river pilot" (R. 1417).

15. THE MAJORITY OPINION SHOWS CLEARLY THAT THE COURT REJECTED THE "FELTRE" PILOT'S VERSION OF THE COLLISION, AND SHOWS FURTHER THAT THE EVIDENCE AGAINST THE "EDWARD LUCKENBACH" WAS DOUBTFUL.

The majority opinion states:

"Witnesses on board the Feltre testified that very shortly prior to the collision the Luckenbach crossed the Upper Cottonwood Island Range; and the court found this to be true. However, *it may be doubted whether the Luckenbach actually crossed the course*

> *of the Feltre in the manner testified.* It seems *rather more probable* that when Pilot Turppa's view of the range lights was blotted out by the Luckenbach the latter had already commenced her swing to the right; and that as she swung the vessel's advance brought her between the Feltre and the shore lights." (R. 1426)

We wish to emphasize that the majority of the court stated that "*it may be doubted*" whether Captain Turppa's version of the "Luckenbach" navigation was correct, and that "it seems *rather more probable*" that the "Edward Luckenbach" was swinging to the right (as shown by her gyro compass record).

Captain Turppa's testimony was analyzed in detail in the dissenting opinion of Judge Wilbur, who stated that the testimony was contradicted by the automatic compass record of the "Edward Luckenbach" and concluded "that Captain Turppa's account of the accident is so at variance with established facts as to be altogether unreliable" (R. 1452).

The majority opinion continues as follows:

> "*But whatever may be the fact, the record as a whole is persuasive* that the Luckenbach was so far off her proper course as to come between the Feltre and the lights by which the latter was steering, thus leading the *mystified* Turppa to believe that the Luckenbach was pursuing a crossing course and that his only safety lay in turning his own vessel to the left." (R. 1426)

Earlier in the majority opinion (R. 1422), the confusion in Turppa's mind was attributed, in part at least,

to the failure of the "Feltre" to maintain a lookout and to hear the "Edward Luckenbach's" one-blast signal.

That the facts were in doubt in the minds of the majority of the court is clear from the foregoing excerpt from the opinion wherein the court said "But *whatever* may be the fact". Nevertheless, the majority opinion states "the record as a whole is persuasive" that the "Edward Luckenbach" was off her proper course.

We do not believe that this court will agree for a moment that the foregoing statement of the majority of the Circuit Court of Appeals is a sufficient justification for condemning the "Edward Luckenbach", in view of the law, as settled by the decisions of this court, that evidence against the "Edward Luckenbach" is required to be *clear and convincing and that any reasonable doubt should be resolved in her favor.*

16. **THE FAILURE OF THE MAJORITY OF THE COURT TO APPRAISE THE VALUE OF THE CONWAY CHART CONFIRMS THE CONCLUSION IN THE DISSENTING OPINION THAT THE CONWAY CHART SHOULD BE ENTIRELY DISREGARDED AND THAT IT WAS UTTERLY WORTHLESS.**

The majority opinion states:

> "The Luckenbach was equipped with a Sperry gyroscope compass. Connected to the compass was an auxiliary course recorder which automatically made a record of the courses steered and the corresponding times. An interpretation of the gyro record made by the Sperry Company shows the various courses steered by the Luckenbach for each minute during the time. On the basis of this data, and on the assumption that the collision occurred where the

Feltre sank in the river, a Captain Conway undertook to reconstruct the Luckenbach's course from the time she left the Longview bridge until the collision. Conway's chart, *if accepted as accurate,* tends strongly to confirm the Feltre's side of the case.

"The reconstructed course is a theoretical one and *no allowance was made by Conway for the influence of wind, tide and current,* or for the vessel's advance in turning. Counsel for the Luckenbach argue that, in addition to these infirmities, the evidence afforded by Conway's chart is patently inaccurate in other respects. *We will not undertake to appraise the value of the charted course,* and *we have given it little consideration* in evaluating the testimony. The theoretical showing was admissible for what it might be worth. Whatever its worth it is corroborative of the testimony of eye witnesses and of the circumstances to which we have called attention. *We do not believe that the master or the trial court gave excessive weight to this showing.*" (R. 1426-27)

The record shows, as we have pointed out heretofore, that the Commissioner based his finding against the "Edward Luckenbach" on the alleged violation of the "narrow channel" rule, *solely* on the Conway chart (R. 234, 239, Conway Ex. 1, R. 1335).

The majority of the court also used the Conway chart, as the opinion shows, to establish that the "Edward Luckenbach" crossed the upper range (R. 1425). There was no other evidence to which the court could refer.

Now, however, the majority of the court replies to petitioner's objections to the Conway chart by stating that the court "will not undertake to appraise the value of

the charted course", and that the court has "given it little consideration in evaluating the testimony" (R. 1427).

The majority opinion states further its belief that the master or the trial court did not give excessive weight to this showing (R. 1427). The record, however, shows that the court was mistaken in its belief, as the Commissioner based his finding that the "Edward Luckenbach" crossed the upper range *solely on the Conway chart* (R. 234, 239).

In the dissenting opinion (R. 1441-3) Judge Wilbur did not hesitate to appraise the value of the Conway chart, and showed by a critical examination of the evidence that the chart "should be entirely disregarded" (R. 1441) and that it was "utterly worthless" (R. 1442).

Obviously, a conclusion that is based upon an actual study of the relevant evidence and which is supported by cogent reasons, is entitled to infinitely more weight than a conclusion in which the court states that *it would not undertake to appraise the value of the evidence* and that the same had been given *little consideration* by the court.

17. THE MAJORITY AND MINORITY OPINIONS AGREE THAT THE "FELTRE" TESTIMONY AGAINST THE "EDWARD LUCKENBACH" SHOULD BE REJECTED.

A comparison of the majority and the dissenting opinions shows that they are in agreement upon two important points, namely:

1. Turppa's version of the facts of the collision was erroneous.

2. No consideration should be given to the Conway plot.

The majority of the court, however, erroneously concluded that "the record as a whole" justified an affirmance of the decree against the "Edward Luckenbach", while the dissenting opinion correctly stated that there was *no clear or convincing evidence* of fault against the vessel.

That the dissenting opinion was clearly correct is shown by the authorities to which we will now refer.

VI. AUTHORITIES.

1. **IN VIEW OF THE CLEAR FAULT OF THE "FELTRE", ESTABLISHED BY UNCONTRADICTED TESTIMONY, AND SUFFICIENT TO ACCOUNT FOR THE COLLISION, THE EVIDENCE TO ESTABLISH FAULT AGAINST THE "EDWARD LUCKENBACH" WAS REQUIRED TO BE CLEAR AND CONVINCING, AND SHE WAS ENTITLED TO HAVE ALL REASONABLE DOUBT RESOLVED IN HER FAVOR.**

The City of New York, 147 U.S. 72, 85;

The Ludvig Holberg, 157 U.S. 60, 71;

The Oregon, 158 U.S. 186, 197;

The Umbria, 166 U.S. 404, 409;

The Victory & The Plymothian, 168 U.S. 410, 423;

Marshall Field & Co. vs. United States, (C.C.A. 2) 48 F. 2d 763, 766;

La Flandre, (C.C.A. 3) 9 F. 2d 331, 333;

The Haven Belle, (C.C.A. 4) 85 F. 2d 939, 941;

Otto Marmet Coal & Mining Co. vs. Fieger-Austin Dredging Co., (C.C.A. 6) 259 F. 435, 442;

The Eagle, (C.C.A. 9) 289 F. 661, 663;

Yamashita Kisen Kabushiki Kaisha vs. McCormick Intercoastal S. S. Co. (C.C.A. 9) 20 F. 2d 25, 27.

In *The City of New York,* (supra) this court said:

> "Where fault on the part of one vessel is established by *uncontradicted testimony,* and such fault is, of itself, *sufficient to account for the disaster,* it is not enough for such vessel to raise a *doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and *any reasonable doubt* with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In *The Victory and the Plymothian* (supra) this court said:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be *clear and convincing* in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."

The foregoing authorities show that the "major and minor fault rule" as stated in the leading case of *The City of New York,* (supra) is definitely established as the controlling rule in cases in which the fault of one vessel is clearly established by uncontradicted testimony.

The failure of the District Court to apply this established rule in favor of the "Edward Luckenbach" was assigned as error by petitioner (R. 305, 306) and the question, therefore, was squarely before the appellate court.

In the dissenting opinion, Judge Wilbur cites the decisions of this court in support of his conclusion that the "Edward Luckenbach" should be exonerated (R. 1440).

The majority opinion, however, does not even refer to the rule, nor to the fact that the "Feltre" faults were established by uncontradicted testimony, and contains nothing that indicates that the rule was given any consideration whatever in weighing the case against the "Edward Luckenbach".

In fact, the majority opinion indicates the contrary, as the court stated generally that the evidence was "in sharp conflict", which was an obvious error so far as the testimony against the "Feltre" was concerned.

2. **AN ADMIRALTY APPEAL IS A TRIAL *DE NOVO* AND REQUIRES AN EXAMINATION BY THE APPELLATE COURT OF THE ENTIRE BODY OF THE EVIDENCE IN ORDER TO ARRIVE AT AN INDEPENDENT JUDGMENT.**

In *Watts, Watts & Company, Limited v. Unione Austriaca*, 248 U.S. 9, this court said (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler v. Eaton*, 141 U.S. 240; *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 506.
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> * * * * * * *
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> In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton v. United States*, 5 Cranch 281; *Irvine v. The Hesper*, 122 U.S. 256, 266; *Reid v. American Express Co.*, 241 U.S. 544."

This quotation was cited with approval by this court in the more recent case of *Langnes v. Green*, 282 U.S. 531, 537.

The subject of trials *de novo* on appeals of admiralty causes was reviewed at length in *Munson S.S. Line v. Miramar S.S. Co.* (C.C.A. 2) 167 F. 960, wherein the Circuit Court of Appeals for the Second Circuit concluded that an appeal vacated the decree of the district court and that the appellate court might revise the decree of the lower court in matters of fact or law, even in favor of a party who had not appealed.

The opinion in the *Munson S.S. Line* case has been cited with approval by this court in several decisions.

Reid v. American Express Co., 241 U.S. 544, 548;
Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146, 155;
Langnes v. Green, 282 U.S. 531, 536.

The function of the appellate courts on trials *de novo* in admiralty was also the subject of an extended review by Judge Denman of the Ninth Circuit in the case of *The Ernest H. Meyer*, (C.C.A. 9) 84 F. 2d 496, wherein the court said (pp. 500-1):

> "It is difficult to believe that, after our broad power in new trials in admiralty appeals recognized by the Supreme Court in 1932 in Brooklyn Eastern Dist. Terminal v. U.S., supra, that Court, without even mentioning in the McCrea Case that it is considering any change in the new trial as effected by Rule 46½, there intended to hold that new trials had been abolished and that we should consider the case as if brought here by writ of error. Until in this or some other case the Supreme Court shall clear up the doubt, we therefore adhere to the rule as stated in The Andrea F. Luckenbach (C.C.A.) 78 F. (2d) 827, 828, as follows: 'The well-established rule

is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence.'

"In so weighing the evidence it is not weighed with the end in view of determining whether *a part of the evidence* warrants an inference supporting the finding. We must weigh *the whole evidence*. We so understand the recent opinion in The Mauretania (C.C.A. 2) 80 F. (2d) 225, 228, when he speaks of our going 'at large into the evidence' to determine the correctness of the findings and of the value of the District Judge's decision as 'the *aid* to be derived from his consideration of the facts and the law.' Cf. The Mabel (C.C.A. 9) 61 F. (2d) 537, 540.

* * * * * * *

"It is obvious that, where the testimony is in part in deposition and in part heard by the court, and the conflict is between the heard and unheard witnesses, there cannot be a balancing of credibility between the two. In such a case, and where all or substantially all of the evidence pertinent to the finding is given by deposition, the presumption is of lesser weight and more easily may be rebutted. The Natal (C.C.A. 9) 14 F. (2d) 382, 384: 'The rule that findings of fact are entitled to great weight in an appellate court is modified where, as here, they are based wholly upon depositions.' U.S. v. Los Angeles Soap Co. et al. (C.C.A. 9) 83 F. (2d) 875, decided May 14, 1936.

"In this case the evidence of all the officers and crews of both vessels, testifying to their control of their respective movements toward the collision, is by deposition. The presumption supporting the findings below, therefore, has the slight weight described in The Natal, supra."

From the foregoing authorities it is clear that in the instant case the majority of the Circuit Court of Appeals failed to determine the appeal of petitioner according to the principles that govern in a trial *de novo.*

Instead of weighing the *whole evidence* in the light of the presumptions in favor of the "Edward Luckenbach" that resulted from the clear fault of the "Feltre", the majority opinion shows that the court erroneously proceeded on the theory that the entire evidence was "in sharp conflict" and therefore the findings of the District Court should not be disturbed.

On *one point only* with respect to the navigation of the "Edward Luckenbach" (the alleged violation of the "narrow channel" rule) was the evidence reviewed even superficially in the majority opinion, and on that issue the majority of the court failed to give to the "Edward Luckenbach" the benefit of the doubt to which the vessel was clearly entitled under the rule in *The City of New York,* (supra). The remaining claims of alleged fault were passed over with the statement that "Whether each vessel was guilty of all of the faults attributed to it we need not inquire" (R. 1421).

With respect to the Conway plot on which, alone, the Commissioner based his finding that the "Edward Luckenbach" violated the "narrow channel" rule (the only alleged fault of that vessel considered in the majority opinion), the court said:

> "We will not undertake to appraise the value of the charted course, and we have given it little consideration in evaluating the testimony." (R. 1427)

VII. CONCLUSION.

A careful review of the whole body of the evidence, as required on a trial *de novo*, should have convinced the majority of the court that:

(a) The faults of the "Feltre" were clearly established by uncontradicted testimony and sufficient to account for the collision.

(b) On the issue of the alleged violation of the "narrow channel" rule there was no clear and convincing evidence to establish fault on the part of the "Edward Luckenbach".

(c) There was no evidence whatever to sustain the other alleged faults found against the "Edward Luckenbach".

The foregoing conclusions clearly appear from our analysis of the majority opinion, and show that this is a proper case for the review of the majority decision by this court.

More convincing, however, than any argument that we can present, is the able dissenting opinion of the senior circuit judge, which is appended hereto, and to which petitioner refers in support of its petition for a writ of certiorari.

San Francisco, California,
June 8, 1942.

Respectfully submitted,

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(APPENDIX FOLLOWS)

DISSENTING OPINION OF JUDGE WILBUR

WILBUR, Circuit Judge:

I dissent.

An explanation of my reasons for disagreeing with the opinion of the majority requires a detailed examination of the facts. The collision between the steamship Edward Luckenbach and the motorship Feltre occurred at 1:40 on the morning of February 17, 1937, in the Columbia River at a point between Cottonwood Island and Prescott, Oregon, about four miles above Longview, Washington. The question at issue herein is the responsibility for the collision. The Commissioner held both vessels at fault and the owners of the Edward Luckenbach entitled to limit their liability. The district court approved and adopted the findings and entered an interlocutory decree. From this decree both sides have appealed.

The Edward Luckenbach was owned by the Luckenbach Steamship Company, Inc., and the Feltre by the Societa Anonima Partecipazioni Industriali Commerciali.

The Societa Anonima Partecipazioni Industriali Commerciali and Navigazione Libera Triestina, S. A., the owner and operator of the Feltre, filed a libel against the Luckenbach Steamship Company, Inc., as owner and operator of the Luckenbach, and against the Luckenbach herself, to recover damages sustained by the Feltre and her cargo in the said collision. This libel was filed in the Northern District of California.

Thereafter, the Luckenbach Steamship Company, Inc., as owner of the Edward Luckenbach, filed in the District

Court for the Northern District of California, a petition for exoneration from or limitation of liability. The owners and operators of the Feltre and her cargo thereupon filed claims and answers in the limitation proceedings, as did the Spett Societa di Sicurata Fra Amatori, the underwriter of the Feltre's hull.

Objections to these claims and answers were filed by petitioner Luckenbach Steamship Company, Inc., which also filed a cross-libel against the owners and operator of the Feltre for damages sustained by the Luckenbach in the collision.

The trial court found as follows:

> "The Edward Luckenbach is a steamturbine vessel of about 6141 net tons burden, being 457 feet long and having a beam of 57 feet. At the time of the collision she was proceeding up the Columbia River bound for Portland, Oregon. She was partly loaded and had a draft of 14 feet 6 inches forward and 18 feet 6 inches aft.
>
> "The Feltre, a motorship powered by means of a Burmeister Diesel engine, is a vessel of 6101 tons gross burden and 3773 tons net burden and is about 460 feet in length with a beam of 55 feet. At the time of the collision she was proceeding down the Columbia River bound to sea. She was carrying about 3500 tons of cargo and had a draft of 16 feet 2 inches forward and 18 feet aft.
>
> "Prior to and at the time of the collision, the wind was estimated to be blowing from 25 to 60 miles per hour from a south southeasterly direction, or approximately directly down the Upper Cottonwood Island Range. The wind was striking the Feltre astern and was

striking the Edward Luckenbach on her starboard bow as the vessels proceeded toward the point where the collision occurred. Visibility was good, although it was raining, and was estimated by witnesses to be from three to six miles. The tide was ebb and was running against the Luckenbach; and the set of the tide and current was toward the Washington side of the river in the vicinity where the collision occurred. The current was running at a speed of about two knots per hour. The vessels sighted each other when the Edward Luckenbach was below the red flashing buoy on Dobelbower Bar and the Feltre was about Prescott.

"The Columbia River in the vicinity where the two vessels were navigating for some time prior to and at the time of the collision is a narrow channel within the meaning of Article 25 of the Inland Rules (33 U.S. Code, section 210), and said Article 25 was applicable to the navigation of both vessels in approaching and passing each other.

"Both vessels had been proceeding with engines at full speed ahead for some time prior to the collision and both vessels continued with engines at full speed ahead until the impact. The speed of the Edward Luckenbach was about 7.77 knots per hour over the ground and the speed of the Feltre was about 12 knots per hour over the ground.

"The two vessels collided at a sharp angle. The stem of the Edward Luckenbach struck the Feltre on her starboard side at the No. 2 hatch and ripped off a considerable section of the Feltre's plating, as a result of which the Feltre sank.

"The collision occurred about four miles above Longview, Washington, at a point between the upper

end of Cottonwood Island and the lower end of Prescott Dock, and, with respect to the channel, the collision occurred between the Upper Cottonwood Island Range and a point 300 feet to the right of the Upper Cottonwood Island Range, proceeding upstream.

"The collision and the resulting damage to both vessels and to the cargo carried on the Feltre was due to and caused by the negligent navigation and faults of both vessels in the particulars hereinafter set forth.

"The steamship Edward Luckenbach and petitioner were guilty in the following respects of negligent navigation and faults which contributed to and caused the said collision and consequent damages:

"1. She violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range.

"2. She failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions.

"3. She proceeded at an immoderate rate of speed for the conditions prevailing.

"4. She failed, in a channel of ample width to enable the vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre.

"5. She failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing the Feltre.

"The Feltre and those in charge of her navigation were guilty in the following respects of negligent nav-

igation and faults which contributed to and caused the said collision and consequent damage:

"1. She did not have a proper lookout in that no lookout was stationed in the bow of the ship and no member of the watch was stationed elsewhere for the sole purpose of acting as lookout.

"2. She failed to sound the danger signal and failed to stop and reverse as required by the attendant circumstances and conditions.

"3. She sounded a two-blast signal and altered her course to her own left before the Edward Luckenbach assented.

"4. She violated the narrow channel rule by swinging to her own left across the Upper Cottonwood Island Range.

"5. She proceeded at an immoderate rate of speed for the conditions prevailing.

"6. She failed in a channel of ample width to allow a safe margin for passing the Edward Luckenbach.

"7. She failed to take any compass bearings of the Edward Luckenbach as the two vessels approached each other, a precaution which would have permitted her to observe a safer margin in passing the Edward Luckenbach."

A copy of the government chart of the locality is incorporated in the majority opinion, with explanatory remarks inserted thereon. The location of the wreck of the Feltre is indicated by an arrow. I shall refer to the ranges and the lights as indicated on the chart without further description except where necessary to explain the point under discussion.

The meridian line of the chart is at an angle of about 45° with the vertical line of the chart as printed in the opinion. The course along the lower Cottonwood Range is 126°. The course along the Upper Cottonwood Range upstream is 173°. The terms upper and lower range are used to distinguish between two ranges, one of which is farther downstream than the other. I shall refer to the easterly and northerly bank on the Washington side of the stream as the Feltre's side of the channel, and the southerly and westerly side of the stream, that is, the Oregon side, as the Luckenbach's side of the channel.

I agree, as the lower court found and the majority opinion holds, that the vessels were obligated to follow the narrow channel rule in their relation to each other as they approached for passing. The chart shows the wreck of the Feltre about 300 feet from the upper range on the Luckenbach's side of the channel. There is some dispute between the parties as to whether or not the location of the wreck of the Feltre is at the point of collision, the Feltre claiming that the collision occurred on the Upper Cottonwood Island range and that the Feltre was shoved off the range to her present location by the Luckenbach in the collision.

The character of the injuries to the Feltre and her cargo would indicate a sudden sinking. Divers examining the wreck found certain wreckage on the bottom located about 15 feet from the starboard side of the Feltre and 55 feet upstream from the point on the Feltre from which they were detached by the force of the collision. The anchor flukes of the Luckenbach which were broken

off by a boat davit on the Feltre were also found in the same relation to the wreck of the Feltre, indicating a movement of 55 feet downstream and 15 feet transversely.

I conclude that the collision occurred 55 feet upstream from the position of the Feltre wreck while she was 15 feet farther to her right than the position of the wreck.

The place of the collision corroborates the testimony of the Luckenbach that she was proceeding upstream on her own side of the channel, in conformity with a one-blast signal given by the Feltre and answered by the Luckenbach, when the Feltre sounded two blasts and turned to her left to the point of collision and that the Luckenbach, while sounding the danger signal, attempted to conform to the two-blast signal by turning to her left to the point of collision. It also tends to negative the contention of the Feltre that the Luckenbach began to cross to the wrong side of the channel, thus justifying the two-blast signal and left turn of the Feltre, and then turned to her right to recross the bow of the Feltre just before the collision. As the point of collision is virtually decisive of the case I shall answer more fully some of the arguments advanced on behalf of the Feltre to support her contention.

It is claimed the Feltre was proceeding downstream on the upper range, which would give her a heading of 353°; that the Luckenbach crossed her bow from left to right when only a thousand feet away, then turned back to her own right and struck the Feltre's starboard side before the Feltre could alter her course. That is to say, that the Feltre, during the 1,000 feet, would continue to advance

along the course she was then steering and not in the direction of the new heading because of the principle known as the advance of a vessel during turning.[1] In

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[1] "Under the laws of physics governing the movement of a vessel through water, the 'Feltre' could not have veered appreciably from her old course before the collision. Even after her head began to change direction, her hull continued to 'crab' straight ahead or even to leeward. The subject is clearly and accurately discussed by the outstanding book on navigation—Knight's Modern Seamanship 8th edition.

"In discussing the subject of the steering of steamers, he has the following to say: (p. 328)

> " 'The first effect of putting the rudder over is to throw the whole mass of the ship off to leeward, so to speak; that is to say, to the side opposite that toward which it is desired to gain ground. The stern goes off most; but the whole ship, except the extreme bow, is thrown more or less to this side, and some experiments have seemed to show that even the bow goes off at first.
>
> " 'The ship ranges ahead nearly along the line of her original course, but slightly to leeward of it, for a distance which may be roughly stated as from two to three ship's lengths, before she commences to gain ground in the desired direction.
>
> " 'The momentum of the ship along her original course persists for a time and drives her on along this line in spite of the forces which are turning her head away from it.
>
> " 'The stern does not finally clear the line of the original course until it has covered from two to three lengths measured along that line. In the meantime, the ship's head has changed by more than three points.'

"Moreover, the Commissioner recognizes the soundness of the contention of Admiral Knight, that a ship

short, the argument is that the Feltre skidded into the Luckenbach along the course she was pursuing at the time the two-blast signal was given by the Feltre which would mean that the collision must have occurred upon the upper range if the Feltre was proceeding along it as she claims. The Feltre's deduction from this situation is that she was pushed to the point where she sank after the collision and that she did not leave her side of the channel until forced over by the Luckenbach. My conclusion is that the Feltre's argument that the collision occurred on the upper range is not sustained but, on the other hand, the argument leads to the conclusion that the

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ranges along her course for two or three lengths, after a helm order is given and executed, in holding as follows:

> "'It is an established fact that a ship does not begin to change her course immediately upon changing rudder, but will actually move away from the direction of the turn, or pursue her old course before it proceeds in the new course. The distance thus achieved along the new course is called "advance".'
>
> * * * * * * *

"Knight's book sets out diagrams showing that a vessel 420 feet long (the 'Feltre' was 460 feet long) proceeds for over 600 feet along her old course before beginning to make actual progress on the new course, away from the old. Her heading may change by 3 points (33 degrees or more), but the path followed in the water by her hull continues along the old line.

"In this case Knight's principle means that while the Feltre's heading may have changed to the left 20 degrees (as Second Officer Magris testified), her hull continued along her old path on the Cottonwood range, right up to the time of collision."

Feltre was proceeding on the wrong side of the channel when she was struck by the Luckenbach.

Moreover, in addition to the circumstantial evidence as to the place of collision, which is well-nigh conclusive, there is direct evidence of the pilot and the helmsman of the Feltre that before her two-blast signal the Feltre had already turned off the upper range to the left, presumably for the purpose of following the channel which passes between the flashing red buoy and the green light, and that instead of steering directly toward the upper range lights the Feltre was then being steered with the range lights on her starboard bow. I quote from their testimony in the margin.[2] I recognize that these wit-

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[2]Captain Turppa:

"Q. Prior to your blowing two whistles were you or were you not still steering by the range lights on the Upper Cottonwood Range?

"A. I was, but I changed it, because the Feltre was slow-steering; she didn't change her course very much.

* * * * * * *

"Mr. Graham: I understand, yes. Captain, at the time you blew the two whistles on the Feltre were you or were you not on the Cottonwood Island Range?

"A. I was on the Cottonwood Island Range, but I steered off from it a little bit. I was just starting to swing when the Luckenbach came from my starboard side and nearly headon."

Cernolli, wheelsman:

"Q. Could you tell whether the lights of the ship which you saw were or were not coming toward your ship?

"A. Yes, they were coming towards our bow.

"Q. And how did the white lights which you

nesses also gave contrary testimony, but the statements set out herein are more in harmony with the known facts and other testimony. In evaluating this testimony it should be observed that the pilot in command of the Feltre was not using compass courses to steer by but was conning the ship with reference to the navigational beacons and that at the particular time involved in this action, the helmsman who had been steering with the upper range lights dead ahead had apparently been directed to swing to the left from the range without being given any exact or accurate course to steer.

With such steering it is quite understandable that the Feltre may have swung to her left too far and too soon and in so doing placed the Luckenbach between herself and the range lights. As there are considerations which

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were steering by bear at that time?

"A. You mean the shore lights? The shore lights were on my starboard.

* * * * * * *

"Mr. Graham: He has already testified that the lights he was steering with bore dead ahead of him.

"Mr. Dorr: No, that was testimony of counsel, statement.

"Mr. Graham: I don't think it was. Let me ask you, when you first saw the vessel, the lights of a vessel, on your port end [hand], as you testified, where did the lights that you were steering by bear?

"A. Directly at our bow. Directly at our bow. I am talking about the shore lights. Of course, I don't know anything about the position of the lights. It is dark, I don't know anything about the position. I only follow the instructions of the pilot."

tend to contradict this conclusion I do not attempt to find the exact course pursued by either vessel. It is enough to say that the evidence indicates a clear fault on the part of the Feltre in leaving her side of the channel with no clear, convincing proof that the Luckenbach was in the wrong;[3] on the contrary, the circumstantial evidence and the quoted testimony given by pilot and wheelsman of the Feltre corroborates the testimony of the Luckenbach that she was at all times on her own side of the channel and that the collision resulted from the action of the Feltre in leaving her side of the channel. (The City of New York, 147 U.S. 72, 85; The Victory & The Plymothian, 168 U.S. 410, 423.)

The Feltre and the cargo claimants, in order to exculpate the Feltre from fault in making a sudden change of course to her left, advance the claim that the Luckenbach, in violation of the Feltre's right of way and pre-

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[3] "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." The City of New York, 147 U.S. 72, 85.

"As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other." The Victory and The Plymothian, 168 U.S. 410, 423.

vious one-blast signal, began to cross the Feltre's bow to the wrong side of the Upper Cottonwood Island range, and thus produced a situation which justified the Feltre in acting in extremis to attempt to avoid the collision by a left wheel as she did. To support this conclusion which, as I have already pointed out, is inconsistent with the location of the collision, it is attempted to reconstruct the whole course of the Luckenbach from the time she left the Longview Bridge until the time of the collision. This attempt is based largely upon the automatic record of the gyro compass course and time shown by the automatic gyro compass recorder on the Luckenbach which shows the heading of the ship at all times during this period. In order to interpret the gyroscopic compass record the recording roll was sent to the Sperry Gyroscope Company which examined the record and from it certified the compass heading for each minute of time from 1:15 a. m. when the Luckenbach passed under the Longview Bridge until 1:41 a. m., the time of the collision.

With these headings and corresponding times Captain Conway, an expert pilot, attempted to draw upon a chart the course indicated by the gyro record. There are several reasons why his charted course should be entirely disregarded. In the first place, the record certified by the Sperry Gyroscope Company is not as accurate as it might have been. The company certified that: "A more accurate and closer check of this Course Recorder record could be made with a special instrument we have for that purpose. This instrument is at our New York office but could be brought here if necessary."

Second, the record did not take into account the effect of the ebb tide or of leeway on the actual course of the vessel.

Third, the course drawn necessarily assumes the element of distance which in turn involves the speed of the vessel, as to which Captain Conway made no satisfactory assumptions and reached no reasonably acceptable conclusions.

One illustration of the difficulties presented by his charted course is shown by the contention of the parties with relation to the course from the white light on the Middle Dike to the passage between the red and green lights off Dobelbower Bar.

Captain Conway showed this space to have been traversed in two minutes, the first minute at 151.5° and the second at 152°. The distance thus run is 3,000 feet which would require a speed of 15 knots. As the Edward Luckenbach could not make more than 13 knots under the most favorable conditions and was heading against an ebb tide estimated at a knot and one-half or two knots, the Feltre argues that the time during which the Luckenbach travelled at approximately 151.5° was about three minutes, that is, that it took three, and not two, minutes to pass between these points. From this point it is argued that the speed was 10½ knots, instead of 15 as shown by Conway's charted course, which speed of 10½ knots conforms to the testimony of some of the witnesses as to speed. The difficulty with this argument is that it proves the chart to be utterly worthless. That is to say, instead of proving it to be accurate it proves that the chart shows

that a certain distance was traversed in two minutes whereas it was actually travelled in three minutes.

The course traversed by the Luckenbach up to the time the two vessels sighted one another when one and one-half miles distant is entirely immaterial. The Feltre and cargo claimants rely so strongly upon the contention that the evidence shows that during that period the Luckenbach was travelling on the wrong side of the channel that perhaps something further should be said on the subject. It is true that in navigation the course and distance traversed between changes of course are considered in determining the position of the vessel at any given time. This approximate method is called dead reckoning. A position ascertained by dead reckoning always gives way to the more correct determination of the actual position by astronomical observation, or by a fixing of the position of the vessel with reference to distance and direction from known objects or monuments. For illustration, if the Luckenbach passed within 150 feet of the flashing red buoy, as her witnesses testified, it is of no significance that the course charted by Captain Conway placed the ship within 300 feet of the green light. The difference would merely show that Captain Conway's course was wrong.

The cargo claimants have introduced testimony of several witnesses to show that the Edward Luckenbach, while passing between these red and green lights, was within two or three hundred feet of the green one on the wrong side of the channel.

Before proceeding to consider the testimony of these witnesses separately, I draw attention to a fact which

must be remembered with reference to all of them; that is, that it is impossible for a person observing a light more than a few hundred feet away to tell how far away the light is. This known fact was shown by the testimony of Captain Turppa, pilot of the Feltre, who, when asked whether his ship was 1500 to 2000 feet from the Edward Luckenbach when he gave his two-blast signal, replied, "Probably so, but in the night time it is awful hard to tell, when you have got a light ahead of you, it is hard to judge the distance." Captain Stayton, another witness, also testified that it is impossible to judge the distance of a light with any degree of accuracy. With this fact in mind, I turn to an examination of the testimony offered by the cargo claimants.

The first of the witnesses mentioned was Captain Turppa, pilot of the Feltre, who testified that the Edward Luckenbach was "unusually close", "very close to the green light" when she passed between the two lights. As indicated by him on a chart, the distance was approximately two hundred fifty feet. Had the Edward Luckenbach been approaching directly toward the witness, her apparent position in relation to the red and green lights would have remained constant, and could have been observed with accuracy at any time, whether while she was in fact between them, or before or after. However, as Captain Turppa himself testified, the Edward Luckenbach was not coming toward him, but was on a course crossing his bow from left to right. Under these conditions, her lights would have appeared to move steadily from the red light toward the green one, and it would have been only in the moment that she was in

fact crossing the line between the two lights that he could have seen her true position in relation to them. Thus, the accuracy of Captain Turppa's observation of the relative distances between the ship and the red and green lights, depends upon the accuracy of his determination of the precise instant when she was crossing the line between the lights. Such a determination, however, could only rest upon his estimate of her distance from him; and since he could see nothing of her but her lights, he had no way of determining the distance.

Captain Turppa estimated this distance to have been half a mile at the time that he believed the Edward Luckenbach to be between the lights. Since the Edward Luckenbach and the Feltre were approaching the point of collision at speeds of about twelve and ten knots, respectively, the Edward Luckenbach, when half a mile from the Feltre, would have been about 1382 feet downstream from the point of collision. If she was in fact that far up the stream, and moving in the direction to which Captain Turppa testified, reference to the chart will show that she must in fact have passed between the red and green lights about three minutes before, close to the red one, although she appeared to Captain Turppa to be between them at the later time and closer to the green.

The second witness offered by the cargo claimants to establish the Edward Luckenbach's position as nearer the green light was Lloyd Deuchar, watchman on duty on the bridge of the tug Georgia Burton. The Georgia Burton, with five barges in tow, was proceeding up the right hand side of the channel at a speed which Deuchar

could only describe as "slow", and which her pilot, Captain Carrau, estimated as about four knots. Deuchar fixed the position of the Georgia Burton as about opposite the Dobelbower white light, (half a mile upstream from Rainier) when the Edward Luckenbach made her first turn from the general direction of the lower range. (126° to 151°)

Deuchar estimated that his vessel was then about a mile astern of the Luckenbach. The distance marked by him on the chart is about a mile and a quarter. We have already pointed out that no reasonably accurate estimate can be made of the distance of a light at night. Deuchar, however, claimed to have been able to fix the position of the Edward Luckenbach upstream at various points. He stated that he knew that she had passed the Middle Dyke light some distance before she began to turn (from 126° to 151°), because he could see open water between the light and the ship, and that he could tell when she was between the red and green lights because "she opened up the lower range, then she opened up the red light," and that he could put her lights in a line with the two shore lights, and see that she was nearer the green.

An examination of Deuchar's testimony and chart shows that after making her first turn, the Edward Luckenbach was moving to his right at an angle of 25° with his course as he observed her. It follows that he, as Captain Turppa, could only observe her relative position when between the red and green lights at the moment when she was actually crossing the line between them, and that moment he had no way of determining. His

explanations, referred to above, as to how he fixed the Edward Luckenbach's position with respect to her distance from him, will be seen on examination to have no merit. Everything which he observed would have had the very appearance which he described, whether the Edward Luckenbach was where he thought her, or very much closer to him, so long as she was in the same direction from him. That she was in such a closer position is the testimony of her own officers, and Deuchar was not in a position to observe anything by which this testimony could be refuted.

The third of these witnesses offered by the cargo claimants was Captain Carrau, pilot of the Georgia Burton. He testified that the Edward Luckenbach passed him just at the upper end of Rainier, and turned to the right after getting well past the Middle Dyke light and close to the green light. He said that it would be "pretty hard" for him to tell how close she was to the green light; and as I have already shown with reference to Captain Turppa and Deuchar, it would in fact be impossible for him to estimate the distance. Captain Carrau attempted to fix the position of the Edward Luckenbach as passing near the green light by stating that she shut it off from him; but that would have been equally true had she turned to the right much farther downstream than he thought.

It should also be observed that if the Georgia Burton was just at the upper end of Rainier when the Edward Luckenbach passed her, as Captain Carrau testified, and was opposite the Dobelbower white light when the Edward Luckenbach turned, as Deuchar testified, and her

speed was four knots or more, as stated by Captain Carrau, then only about eight minutes can have elapsed between those events. For the Edward Luckenbach, in those eight minutes, to have traveled from the upper end of Rainier to the point fixed by Deuchar and Captain Carrau as her place of turn she would have had to move at a speed of about fourteen knots. Since her top speed, without adverse wind or tide, was thirteen knots, it seems much more likely that she turned farther downstream than Deuchar and Captain Carrau believed.

The fourth of these witnesses offered by the cargo claimants was Captain Stayton, pilot of the West Camargo. The West Camargo was a freighter which left Longview, bound upstream, just as the Edward Luckenbach was passing. Her speed was about eight knots over the ground. When the West Camargo reached the lower range, a mile upstream from Longview, the Edward Luckenbach appeared to Captain Stayton to be about a mile and a half farther upstream, either on the range or within a ship's width of it to the left. He could see nothing of her but her stern light. At a point which Captain Stayton believed to be about opposite the Middle Dyke light the Edward Luckenbach turned to the right (126° to 152°); but he stated that he could not tell whether it was abeam of the light or above or below it. He testified that when she passed between the red blinker and green light he could see that she was in the half of the channel nearer the green light, about one-third of the way from the green to the red. He saw the Feltre at that time about opposite the upper end of the Prescott dock, but could not tell whether she was in her right

or left half of the channel. He did not notice the Edward Luckenbach after she passed the flashing white front light of the upper range, and at that time she had not crossed to the left of the upper range.

Captain Stayton himself repeatedly pointed out that it was impossible to judge the distance between him and the Edward Luckenbach. His estimate of a mile and a half is obviously erroneous. The two ships were at Longview at the same time, and the highest estimate of the Edward Luckenbach's speed (based on the time it took her to go from Longview Bridge to the Middle Dyke) is about twelve knots. If the speed of the West Camargo was eight knots, the Edward Luckenbach would have been only half a mile, rather than a mile and a half, upstream from the West Camargo when the latter was a mile from Longview.

Captain Stayton, who was himself on the lower range, contradicts the testimony of other witnesses, (Deuchar and Carrau) whose point of view was less advantageous, that the Edward Luckenbach was substantially to the left of the range. He was admittedly unable to tell how far upstream she was when she turned from 126° to 152° and he would for the same reason have been unable to tell when she was in fact between the flashing red buoy and green lights. Thus his testimony so far as it rests on matters which it was within his power to observe supports, rather than conflicts with, the contention of the Edward Luckenbach that she was at all times on her side of the channel.

The Feltre owners have attempted by the testimony of officers and men of their own ship to establish the course of the Edward Luckenbach from the time she passed between the flashing red buoy and fixed green light until the collision. Captain Turppa, pilot of the Feltre, testified that he was steering directly down the Upper Cottonwood Island range (353°) prior to the collision, and that the Edward Luckenbach was proceeding steadily on a course which, as he drew it on a chart, was of 155°, intersecting the course of the Feltre on the range less than a ship's length upstream from the front light of the upper range. The speed of the Feltre he estimated as twelve knots over the ground. He stated that he blew a one-blast signal for a port-to-port passing, just after the Edward Luckenbach had passed between the flashing red buoy and fixed green light, which he estimated to be about a half mile away from the Feltre. He heard no answer to this signal and testified that the Edward Luckenbach held a steady course. He testified that he continued on his course, 353°, until the Edward Luckenbach crossed his bow, so that she obscured the lights of the Upper Range on which he was steering, and continued to hide them from him until after the collision. Upon seeing his range lights obscured, Captain Turppa ordered his wheel left (or hard left) and blew a two-blast signal for a starboard-to-starboard passing, believing, as he testified, that a port-to-port passing was no longer possible. He believed the ships then to be 1500 to 2000 feet apart. Captain Turppa was unable, because of the darkness, to fix his position up or down stream at the time this was done, except that he was below Prescott. He testified that the

Feltre had just begun to swing left when the Edward Luckenbach, which he testified had held a steady course up to that moment, "all at once * * * whirled right around and came over at him." He testified that within half a minute after his two-blast signal was given, the Edward Luckenbach hit the Feltre on her starboard side abreast of the number two hatch, pushing her three hundred feet off the range to her left and that the Feltre sank about 450 or 500 feet downstream from the place of collision.

Captain Turppa's testimony that the Edward Luckenbach held a steady course until immediately before the collision is contradicted by the automatic record of her compass heading,[4] and his estimate of the Edward Luckenbach's position when, as he testified, she obscured the range lights is inconsistent both with his estimate of the distance (1500 to 2000 feet) between the vessels at that time, and with the actual place of collision, which would necessarily have been at least a quarter of a mile farther downstream, had his placing of the Luckenbach been correct.

I conclude that Captain Turppa's account of the accident is so at variance with established facts as to be altogether unreliable.

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[4]This mechanical record establishes that the Edward Luckenbach did not run on a steady course after passing the flashing red light and until the two-blast signal of the Feltre, as the Feltre's pilot testified. On the contrary, her course had varied from 152° to 188.5°. The change of course in the last minute from 188.5° to 180.5° indicates her effort to comply with the two-blast signal of the Feltre and also indicates why the Edward Luckenbach struck the starboard side of the Feltre.

Other witnesses on the Feltre, whose testimony was introduced, were Carlo Cernolli, the wheelsman, Ezio Magris, second officer, who was on the bridge, Mario Rainieri, the captain, and Antonio Roiaz, a sailor.

Cernolli testified that he was steering on the range lights, which were in a straight line "directly on the bow", though he also stated, as previously noted herein, that they were on his starboard. He stated that the Feltre blew a one-blast signal, to which he heard no answer; that about two minutes later the Edward Luckenbach crossed his bow, and the Feltre blew two blasts and ordered hard left. He testified that he could not remember whether or not the Edward Luckenbach obscured the range lights as she crossed his bow, and, that she did.

Immediately prior to the crash, and after the hard left order was given, Cernolli saw the Edward Luckenbach's mast lights and green running light on his starboard hand. He testified both that the Feltre swung left in response to the hard left wheel before the collision, and that he could not recall whether or not she had done so. It is apparent that his testimony as to the course of the Edward Luckenbach is opposed to her automatic compass record, and to that extent is untrue.

Ezio Magris, second mate of the Feltre, was on duty on the bridge at the time of the collision. He testified that the ship was steering on the upper range lights, directly ahead in line, at a speed of 12 knots over the ground. The Edward Luckenbach was first seen 1½ miles off on a course crossing their course at an angle of

from 40° to 50°. Magris also saw the flashing red buoy but could not estimate the Edward Luckenbach's distance from it. The Edward Luckenbach holding this steady course, the Feltre, when they were about three-quarters of a mile apart, blew a single blast. The Edward Luckenbach gave no reply, and made no change in her course, continuing across the Feltre's bow until when about a quarter mile ahead she obscured the range lights. At that instant the Feltre blew two blasts and her wheel was ordered hard left. The Edward Luckenbach continued to the Feltre's right, and the Feltre swung to her left, turning about 20° in the thirty seconds following the two-blast signal. This he testified placed the two vessels about parallel and far enough apart to pass safely starboard to starboard. Then the Edward Luckenbach swung suddenly to her left, and her bow hit the Feltre on her starboard side at the number two hatch, forward of the bridge. The Feltre heeled slightly to her left, then within three or four seconds listed to her right at an angle of about 45°. After drifting for a few minutes, she came to rest on the bottom.

This testimony, like that of Captain Turppa and Cernolli, is irreconcilable with the Edward Luckenbach's compass headings.

Captain Rainieri, master of the Feltre, was not on deck at the time of the collision, but was in his cabin under the bridge, on the starboard side. He heard the single blast, and no answer. Then he heard the double blast, and recognizing it as abnormal, looked out of a starboard porthole, but could see nothing. He then started up to the bridge, and the collision came within 30 or 40

seconds, and before he reached it. The Feltre first listed slightly to the left under the impact, then about 40° to the right, and sank rapidly. Prior to the collision, the ship was steering on the range lights, at a speed of 12½ to 13 knots over the ground, the speed of the current being from one to 1½ knots.

The last Feltre witness whose testimony could shed any light on the conduct of the Edward Luckenbach was Antonio Roiaz, a sailor who had been on the bridge but had gone below to make coffee before the collision. He testified that immediately on hearing the two whistles he looked out from the port side of the Feltre, and saw the stern of the Edward Luckenbach crossing the Feltre's bow but could not estimate its distance away. He heard no whistles from the Edward Luckenbach. He returned to the pantry, and the collision followed shortly. He estimated the interval between the single and double blasts as about a minute.

This testimony tends to corroborate that of Captain Turppa; but, for reasons which I have already stated, I cannot accept the theory that the Edward Luckenbach in fact crossed the bow of the Feltre in the manner described.

The cargo claimants also offered the testimony of Fred Closner. Closner was a track walker who observed the collision from a railroad track close to the Washington shore, at a point about five-eighths of a mile upstream from Carrolls Bluff.

Closner testified that he watched the Feltre and the Edward Luckenbach approaching one another for six

or seven minutes up to the time of the collision; that the Feltre was moving downstream on her right hand side of the river and that she turned slightly away from him just before the collision; that the Edward Luckenbach came steadily toward him across the river, until she turned rapidly to her right half or three-quarters of a minute before the collision; and that the collision occurred on his side of the river.

Perhaps the first comment to be made on Closner's testimony is that Cottonwood Island interposed between him and the main part of the river where the collision occurred. This would in itself make it difficult for him to judge the position of the ships in relation to the sides of the river. He testified that he could not tell if the ships moved toward him or away from him after the collision. It is not shown that he knew the location of the navigable channel and he did not claim to locate the ships with relation to the channel, which is the point in dispute.

It will also be noted that Closner's statement that the Edward Luckenbach pursued a steady course toward him until half or three-quarters of a minute before the collision is refuted by her gyro record which shows a steady turn to the right for the period from three minutes before the collision to one minute before it. All the evidence to the contrary is insufficient to overcome the evidence of the pilot of the Luckenbach and his corroborating witnesses that he steered for a point about 150 feet to the left of the red flashing buoy and passed the buoy at that distance from it.

I conclude that the Edward Luckenbach was not at fault in passing to the left hand side of the channel or in failing to allow sufficient space for safe passage of the Feltre.

The Luckenbach's other faults.

The Commissioner and the trial court also found the Edward Luckenbach failed seasonably to sound the danger signal and to stop and reverse. The evidence is that there was no apparent danger of collision until the Feltre sounded the two-blast signal and that the Edward Luckenbach instantly sounded the danger signal and signaled to stop and reverse and that the engines were stopped, but that in the short period, estimated at 30 seconds, before the collision there was no time to reverse.

In support of the finding the cargo claimants argue that, whether or not the Edward Luckenbach both violated the narrow channel rule and also failed seasonably to stop and sound the danger signal, she must be guilty of at least one of these faults. According to her own witnesses, they say, the Edward Luckenbach's danger signal and stop order preceded the collision by from ten to thirty seconds. The Feltre could not leave her course in so short a time. Therefore, the collision was necessarily on the course which the Feltre had been on before her two-blast signal was given. If that course was on the range, the Edward Luckenbach, to strike the Feltre as she did on the starboard, must have violated the narrow channel rule. If, on the other hand, that course was to the left of the range, the Edward Luckenbach should have observed that fact and blown a danger signal long before the Feltre's two-blast signal was given.

The answer to this is that, according to Captain Turppa, the Feltre had begun her left turn away from the range before the two-blast signal was given. This turn probably was not observable from the Edward Luckenbach until about the time of the two-blast signal, following which it continued to accelerate until, at the time of the collision, it had placed the Feltre three hundred feet to her left of the range.

Cargo claimants next argue that the Edward Luckenbach was at fault in not sooner stopping and reversing. If, they argue, the collision occurred three hundred feet off the range, as the owners of the Edward Luckenbach contend, the Feltre, to achieve that transverse distance from her course, must have moved forward at least 1725 feet. This estimate is based on turning tables shown in Knight on Modern Seamanship. While the Feltre was travelling this 1725 feet, the Edward Luckenbach would have travelled at least 1574 feet, so that the vessels must have been separated by at least 3299 feet when the Feltre first began to leave the range. In other words, over a minute and a half before the collision, if it occurred 300 feet to the Feltre's left of the range, the Edward Luckenbach should have seen the necessity for stopping and reversing, a precaution which she delayed for more than a minute.

This entire argument rests on the assumption, which is said to be admitted, that the Feltre was on the range until she made her hard left turn. In fact this was not admitted. The Luckenbach witnesses merely testified that the Feltre appeared to be about on the range. Since they themselves were never on the range, they could not do

more than approximate the Feltre's position in relation to it, never with enough accuracy to support the careful structure of computations erected by the cargo claimants.

I conclude that the Edward Luckenbach did not fail seasonably to sound the danger signal, stop and reverse.

The finding of the commissioner and the trial court that the Edward Luckenbach proceeded at an immoderate speed is not sustained by the evidence. The evidence in that regard is that her speed did not exceed 10 or 10½ knots, owing to a head wind and ebb tide.

The commissioner also found that the Edward Luckenbach was at fault in failing to take compass bearings of the Feltre. No such fault was alleged in the pleadings, and there is no testimony indicating that such compass bearings would have been of any value under the circumstances.

The interlocutory order should be reversed and the trial court directed to proceed in accordance with the findings as modified, namely, that the Edward Luckenbach was without fault and the Feltre was solely to blame for the collision.

(Endorsed:) Opinion and Dissenting Opinion. Filed Mar. 23, 1942. Paul P. O'Brien, Clerk.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 153

Office - Supreme Court, U. S.
FILED
JUL 27 1942
CHARLES ELMORE CROPLEY
CLERK

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre"),

HAWAII LIQUOR COMPANY, LIMITED, et al. (Cargo Claimants),

Respondents.

BRIEF FOR RESPONDENTS, SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, NAVIGAZIONE LIBERA TRIESTINA, S. A., AND SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 153

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre"),

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BRIEF FOR RESPONDENTS, SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, NAVIGAZIONE LIBERA TRIESTINA, S. A., AND SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF POINTS.

No question is presented by the petition for writ of certiorari justifying the granting of petition.

1. The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same matter.

2. No important question of federal law not heretofore settled by this Honorable Court is involved.

3. No question of local law is involved.

4. The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

RESPONDENTS' SUMMARY OF MATERIAL INVOLVED.

This case involves the question of responsibility for collision which occurred between petitioner's steamer the "Edward Luckenbach" and the motorship "Feltre" on February 17, 1937, in the Columbia River upstream from Longview, Washington (R. 291). The collision caused damage to both vessels and loss and damage to cargo aboard the "Feltre" (R. 293).

A. THE FACTS.

The general facts showing the navigation of the two vessels are sufficiently set forth in the opinion of the Circuit Court of Appeals (R. 1416-1427; 127 F. (2d) 86-90). The two vessels sighted each other while several miles apart. Visibility was good although rain and wind conditions existed. No other vessels were in the vicinity to in-

terfere with the navigation of these two vessels and the channel was of ample width—over 2,000 feet wide—to permit both vessels to safely maneuver.

The "Feltre" was proceeding downstream with the wind astern on the Upper Cottonwood Island Range until about one-half minute before the impact. The "Luckenbach" was proceeding upstream on her left or wrong side of the channel and crossed the projected range of the "Feltre". Thereupon the "Feltre" blew a two-blast signal and turned left in an endeavor made *in extremis* to avoid collision with the "Luckenbach". The maneuver was unsuccessful and the "Luckenbach" crashed into the starboard side of the "Feltre".

B. FINDINGS OF FACT AND DECREE.

1. The matter was tried before a Special Master, part of the testimony being submitted by deposition and the remainder by witnesses appearing in person. Thereafter the matter was extensively briefed and after being submitted the Special Master found both vessels at fault. The District Court approved the findings of fact of the Special Master and made the following findings of fact with respect to the petitioner (R. 293-294):

> "The steamship Edward Luckenbach and petitioner were guilty in the following respects of negligent navigation and faults which contributed to and caused the said collision and consequent damage:
>
> 1. She violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range.
>
> 2. She failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions.

3. She proceeded at an immoderate rate of speed for the conditions prevailing.

4. She failed, in a channel of ample width to enable the vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre.

5. She failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing the Feltre."

2. Subsequently the case was appealed by petitioner to the Circuit Court of Appeals for the Ninth Circuit and a cross-appeal was taken by these respondents. In the Circuit Court of Appeals the matter was argued at length and exhaustively briefed and the decision of the District Court was affirmed.

After quoting the District Court's findings of fault by petitioner as well as the findings of fault on the part of the "Feltre", the Circuit Court of Appeals stated (R. 1421):

> "We see no sufficient reason for disturbing these findings. While the evidence is in sharp conflict the weight of it appears to us to require an affirmance."

3. The present petition is presented by petitioner for the sole purpose of obtaining a fourth review of the disputed questions of fact after decisions by the Special Master, the District Court and the Circuit Court of Appeals for the Ninth Circuit have squarely held on the factual evidence that the "Luckenbach" was at fault. No new or novel questions of law are involved in this petition.

The case involves only a determination of disputed questions of fact. The findings of fault against the "Luckenbach" are clearly and amply supported by testimony of disinterested witnesses as well as by the testimony by the "Luckenbach's" own witnesses. The record as a whole established that the petitioner's vessel wrongfully crossed the course of the "Feltre" (R. 1426) and committed the other faults specified in the findings of fact.

The decision of the dissenting judge in the Circuit Court of Appeals indicates that in his mind the point of collision is virtually decisive of the case (R. 1435). The dissenting judge concluded that the point of impact was nearly 300 feet to the left of the range (or about 150 feet into the "Luckenbach's" side of the channel). That judge concluded that the "Feltre" sank at a point only 55 feet downstream and 15 feet to the left of the point where the impact occurred. Such conclusion is reached directly in the face of the facts that the natural effect of the impact of the "Luckenbach" on the "Feltre's" starboard side at No. 2 hatch would force the "Feltre" to its left; that the "Feltre" was proceeding downstream at a speed of about 12 knots with a following wind and tide; that a vessel travelling at such speed traverses about 20 feet each second; and that it is a physical impossibility for the oiler and fireman to have escaped from the fireroom to the weather deck in the three seconds (55 feet at 20 feet per second) which, under his theory, elapsed between the time of impact and the time the "Feltre" came to rest on the bottom, and affirmative testimony that the "Feltre" was proceeding on the range until it blew its two-blast signal and swung its wheel to the left.

Further, the contention of the dissenting judge is properly answered by the majority opinion as follows (R. 1423-1424):

> "From these physical facts the Luckenbach insists that the Feltre sank practically in the same spot as that at which the collision occurred. However, the master and the trial court accepted the testimony of Pilot Turppa that the Feltre did not sink immediately, but came to rest on the bottom in about her own length, or about 450 or 500 feet. There are good reasons for believing that the estimate approximates the truth. A watchman and an oiler, who were in the engine room of the Feltre at the time of the collision, had ample time in which to go from the engine room to the deck after the crash occurred. It may well be that the wreckage did not drop into the water until the vessels became separated. In any event it is fairly clear that when the vessels collided the Luckenbach was being navigated too close to mid-channel to permit of a safe margin of passing, and this despite the obvious fact that the channel was of ample width to allow ships to pass without at all crowding each other. No other vessels were in the vicinity to complicate the situation."

4. Petitioner's declared basis for requesting allowance of the petition on the ground that the decision below conflicts with decisions of this Court and the Circuit Courts of Appeals (Petition, p. 12) is without merit. The only questions raised by petitioner are questions of fact and on this score petitioner has had three full and complete hearings.

Three lower Courts have found that both the "Luckenbach" and the "Feltre" were at fault in material respects

proximately contributing to the accident. In such a situation the major and minor fault rule is inapplicable. Major faults were committed by the "Luckenbach". These faults were proximate and not remote. The "Luckenbach" was an active and not a passive participant in the accident and under such circumstances there is neither reason nor authority supporting the application of the major and minor fault rule.

5. Were this petition to be granted it would seem to follow that the entire fourteen hundred page record should be reviewed in order to determine whether the "Luckenbach" was at fault or whether the "Feltre" was at fault or whether they were both at fault. The "Feltre" has consistently urged throughout the entire proceedings that it was entirely without fault in the matter. The "Luckenbach" has likewise taken the same stand. The contentions of each vessel on disputed findings of fact have been uniformly rejected by the Special Master, the District Court and the Circuit Court of Appeals for the Ninth Circuit. In each instance the holding was that both vessels were at fault in material respects.

6. This Honorable Court will only reject the uniform findings of fact of the lower Courts upon clear and convincing proof of error (*Just v. Chambers*, 312 U. S. 383, 385). Such error has not been established.

SUMMARY OF ARGUMENT.

The concurent findings of the three Courts below that petitioner's vessel violated the narrow channel rule is supported by conclusive evidence.

1. The testimony of petitioner's own witnesses establishes its fault.

2. Petitioner's own records establish its fault.

3. Competent, disinterested witnesses saw the "Luckenbach" proceeding up the wrong side of the channel.

4. The "Feltre" witnesses saw the "Luckenbach" cross the "Feltre's" range course.

The authorities cited by petitioner do not in any way conflict with the decision of the trial Courts.

1. Petitioner's vessel was found guilty of a major fault on clear evidence.

2. Petitioner was accorded a trial *de novo* in the Circuit Court of Appeals.

The dissenting opinion is based on assumptions of fact which are not supported by the record.

CONCLUSION.

It is respectfully requested that this Honorable Court deny the writ of certiorari.

Dated, San Francisco, California,
July 24, 1942.

W. F. WILLIAMSON,
Counsel for Respondents,
Owners and Underwriters of the
Motorship "Feltre".

CLARENCE G. MORSE,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....day of July, 1942.

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Counsel for Petitioner,
Luckenbach Steamship Company, Inc.

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Counsel for Respondents,
Hawaii Liquor Company and 64 others,
Cargo Claimants.

IN THE
Supreme Court
OF THE
United States

Supreme Court, U. S.
FILED
JUL 26 1949
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1949

No. 152

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT. SOCIETA ANONIMA DI SICURATA FRA ASSICURATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre");

HAWAII LIQUOR COMPANY, LIMITED, et al. (Cargo Claimants),

Respondents.

BRIEF FOR RESPONDENTS, HAWAII LIQUOR COMPANY AND 64 OTHERS, CARGO CLAIMANTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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No. 153

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre"),

HAWAII LIQUOR COMPANY, LIMITED, et al. (Cargo Claimants),

Respondents.

BRIEF FOR RESPONDENTS, HAWAII LIQUOR COMPANY AND 64 OTHERS, CARGO CLAIMANTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This litigation arises out of a collision between petitioner's steamer, the Edward Luckenbach, and the motorship Feltre, on February 17, 1937, in the Columbia River upstream from Longview, Washington (R. 291). The collision caused damages to both vessels and the loss of and damage to the cargo aboard the Feltre (R. 293). This brief, in opposition to the petition for writ of certiorari, is presented in behalf of Hawaii Liquor Company and 64 others,[1] who were the owners of the cargo aboard the Feltre and who had nothing to do with navigation of either vessel.

The petition filed herein by Luckenbach Steamship Company, Inc., presents no special nor important reasons for a review on writ of certiorari. On the contrary, it is apparent from the opinion of the Circuit Court of Appeals (R. 1416; 127 F. (2d) 86), and even from the petition filed herein, that the issues presented in this litigation were wholly questions of fact. The legal principles applicable to the facts found by the Courts below and which were applied to such facts are well defined and well established by statute and decisions.

Petitioner seeks by its petition herein merely to secure a *fourth* review of the evidence on which it was held mutually at fault for the collision. The evidence was first considered by an experienced Special Master to whom the case was referred for hearing and determination. The Special Master, after considering the evidence and the briefs of all parties, made a full report and findings of fact holding both vessels to blame for the collision (R. 204-246).

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[1]The identity of all the cargo claimants is set forth at pages 78-81 of the Record.

The evidence was again considered by the District Court on exceptions by the owners of both vessels to the report and findings of the Special Master (R. 251, 278). The District Court, after considering the exceptions on the entire record and briefs of counsel, approved the report of the Special Master and made findings that both vessels were guilty of faults which caused the collision (R. 289-297).

The evidence was reviewed a third time by the Circuit Court of Appeals for the Ninth Circuit on appeals taken by both vessels. The Circuit Court of Appeals concurred with the Special Master and the District Court in finding that both vessels committed faults which caused the collision (R. 1416-1427; 127 F. (2d) 86).

Under these circumstances, the well known rule of this Court as to the effect of concurrent findings of the Courts below applies. The rule was recently reiterated in *Just v. Chambers*, 312 U.S. 383, 385, 85 L. Ed. 903, 905, an admiralty case, as follows:

> "In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimant's injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the Courts below upon these matters (Texas & N. O. R. Co. v. Brotherhood of R. & S. Clerks, 281 U. S. 548, 558, 74 L. Ed. 1034, 1039, 50 S. Ct. 427) and we confine our attention to the question of the survival of the causes of action."

The foregoing rule is the more insistent in the present case because the issues herein were originally heard and determined by a special Master, rendering applicable Su-

preme Court Admiralty Rule 43½ (following 28 U.S.C.A. Section 723) which provides:

> "In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: Provided, That when a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the commissioners or assessors as arbitrators, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator."

Petitioner does not contend that there is no evidence to support the findings of fault on the part of its vessel. It is apparent from the petition and supporting brief of petitioner, as well as from the opinion of the Circuit Court of Appeals, that there is ample evidence, strong evidence, to support the concurrent findings of fault of petitioner's vessel made by the three lower tribunals. Petitioner's contention is that the evidence supporting the findings of fault on the part of its vessel, the Edward Luckenbach, is not as strong as the evidence of fault on the part of the motorship Feltre (Petition, p. 10). This contention, even if it were justified by the record, which it is not, is hardly a proper ground upon which to request this Court to sift, compare and evaluate all the evidence for the sole purpose of determining whether it would give the same weight to

the evidence as was given below by the three concurring tribunals. The separate consideration and review of the evidence by three Courts would seem sufficient to determine the proper weight to be given to the evidence. In actual fact, the evidence of fault on the part of petitioner's vessel is not only clear and convincing, but much of it came from its own records and from the testimony of its own navigators.

A. THE FACTS.

The general facts showing the navigation of the Edward Luckenbach and the Feltre and their consequent collision are sufficiently set forth in the opinion of the Circuit Court of Appeals (R. 1416-1427; 127 F. (2d) 86-90). It shows that these two vessels sighted each other when they were several miles apart. Visibility was good. No other vessels were in the vicinity to complicate their navigation with respect to each other. The river channel was exceptionally wide—over 2,000 feet wide in the vicinity of the collision. Nevertheless, both vessels continued toward each other—the Edward Luckenbach on the wrong side of the channel—at full speed until they collided approximately at mid-channel without either vessel having taken any proper or timely action to avoid a collision.

B. PLEADINGS.

Petitioner Luckenbach Steamship Company, as owner of the Luckenbach, filed a petition for exoneration from liability for the damages arising out of the collision, or in the

alternative, limitation of such liability to the value of the Luckenbach and freight pending at the end of the voyage (R. 19). In conjunction with the limitation proceeding, all persons claiming damages against Luckenbach Steamship Company were restrained from bringing suit except in the limitation proceeding. Claims against petitioner for damages to the Feltre were filed by her owners and operators in the limitation proceeding (R. 49, 127). Claims were likewise filed against petitioner in the limitation proceeding by 65 individuals and corporations who owned the cargo aboard the Feltre (R. 78). Petitioner filed a cross-libel in the limitation proceeding for damage to the Luckenbach against the owners and operators of the Feltre (R. 184). The rights and liabilities of all the parties suffering damages by reason of the collision were thus presented and determined in the limitation proceeding commenced by petitioner.

C. FINDINGS OF FACT AND DECREE.

Although petitioner has set forth at length in its petition (pp. 3-5) the findings of fault on the part of the Feltre, petitioner neglected to set forth the findings of fault on the part of its own vessel, the Edward Luckenbach. The District Court approved the report and findings of fact of the Special Master and made the following findings of fact with respect to petitioner (R. 293-294):

> "The steamship Edward Luckenbach and petitioner were guilty in the following respects of negligent navigation and faults which contributed to and caused the said collision and consequent damage:

1. She violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range.

2. She failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions.

3. She proceeded at an immoderate rate of speed for the conditions prevailing.

4. She failed, in a channel of ample width to enable the vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre.

5. She failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing the Feltre."

After setting forth the foregoing findings as well as the findings of fault on the part of the Feltre, the Circuit Court of Appeals stated (R. 1421):

> "We see no sufficient reason for disturbing these findings. While the evidence is in sharp conflict the weight of it appears to us to require an affirmance."

The decree of the District Court, which was affirmed by the Circuit Court of Appeals, awarded cargo claimants recovery of their damages from petitioner,[2] limited to the amount of the limitation fund, and provided that the

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[2]Cargo claimants may recover their damages only from the non-carrying vessel which may, however, recoup one-half of such damages from the other vessel.

Aktieselskabet Cuzco v. The Sucarseco, 294 U. S. 394, 400, 79 L. Ed. 942, 946;

The Chattahoochee, 173 U. S. 540, 550, 43 L. Ed. 801, 806.

damages be equally divided between the two vessels in accordance with the usual rule for the apportionment of damages arising from collisions due to mutual fault (R. 298).

D. THE ONLY QUESTION PRESENTED IS A REQUEST FOR A FOURTH REVIEW OF THE EVIDENCE.

Petitioner's statement of the questions presented is simply a contention that although the fault of the Feltre was established by uncontradicted evidence and was in itself sufficient to account for the collision, the fault of petitioner's vessel was based upon evidence which was neither clear nor convincing (Petition, pp. 9-11). This contention, which is not supported by the record or by the opinions of the Courts below, is merely an argument as to the weight of the evidence. It is not even a claim that the evidence is insufficient to support the findings of fact on the part of petitioner's vessel.

The separate consideration of the evidence and the resulting concurrent findings of fault against petitioner by the three tribunals below should, under the well-established rule of this Court, constitute a conclusive determination of the facts involved in this litigation. Evidence which has convinced three separate tribunals may, we submit, be safely accepted as clear and convincing.

Petitioner states that the basis for its contention appears on the face of the opinion of the Circuit Court of Appeals. However, petitioner fails to support this statement in either its petition or lengthy brief.

The first premise set forth is that the faults of the Feltre were in themselves sufficient to account for the collision (Petition, p. 10). Petitioner does not set out any finding to that effect and we can find no such finding in the opinion of the Circuit Court of Appeals or in the findings of the District Court or of the Special Master.

On the contrary, both the Special Master and the District Court made express findings that the faults of *each* vessel contributed to causing the collision (R. 246; Finding IX, R. 293).

The Circuit Court of Appeals not only affirmed such findings but also said that "it is clear that each was guilty of one or more serious navigational faults contributing to the collision" (R. 1421).

Petitioner's first premise that the faults of the Feltre in themselves were sufficient to account for the collision thus collapses in the light of the unanimous findings of the Courts below.

Petitioner's contention is made with ill grace in view of the fact that its vessel was found guilty of the *initial* fault, violation of the narrow channel rule, which induced and made operative the subsequent faults of the Feltre (R. 1422). The victim, not the aggressor, ordinarily seeks the benefit of an exculpatory rule.

Yamashita Kisen Kaisha v. McCormick S.S. Co., 20 F. (2d) 25, 27 (9 C.C.A.).

Petitioner's second premise is that the findings of fault of its vessel were based on evidence which was not clear nor convincing. We find it difficult to believe that such contention is made seriously in the face of evidence which

was sufficiently clear and convincing to cause three tribunals below to find that petitioner's vessel was guilty of faults contributing to the collision.

The Special Master found the evidence clear and convincing in holding petitioner's vessel at fault. He said (R. 243):

> "From a perusal of the above, Your Special Master is compelled to reach the inevitable conclusion that both vessels are guilty of major faults and that, as indicated above, they are both chargeable with committing fatal statutory faults of navigation."

The findings of the District Court, confirming the report of the Special Master, express no doubt as to the sufficiency of the evidence (R. 289-297).

Petitioner professes to find such doubt in the opinion of the Circuit Court of Appeals (Petition, p. 10). In developing this theory, petitioner sets forth certain brief phrases carefully culled and conveniently removed from their context in the opinion (Petition, p. 6). Such petty squabbling over the phrases so painstakingly selected from the opinion without regard for the positive findings of the Court is indicative of the lack of merit to petitioner's contention.

The phrases repetitiously applied by petitioner to the evidence are: "in sharp conflict", "fairly clear", "persuasive" and "may be doubted". Findings based on conflicting evidence are not thereby doubtful. Conflicting evidence supports a finding beyond any reasonable doubt in a criminal action and the proof required in a civil action is certainly not more stringent.

"Fairly clear" evidence is not doubtful evidence. "Fairly" means "plainly", "distinctly", "completely" as

well as "moderately". The Circuit Court of Appeals did not in any event use the phrase in referring to the evidence in general, but in pointing out the fallacy of petitioner's contention that the Feltre sank at the very spot of collision (R. 1424).

"Persuasive" evidence certainly is convincing evidence. The Court applied "persuasive" to the fact that the record *as a whole* established that petitioner's vessel wrongfully crossed the proper course of the Feltre (R. 1426).

The Circuit Court of Appeals did not apply the phrase "may be doubted" to the evidence as a whole. The phrase was used in discussing whether petitioner's vessel crossed the Feltre's course during the former's "advance" while trying to swing, or while she was maintaining a steady course (R. 1426). The *manner* in which the Luckenbach crossed the Feltre's course is not the important fact. The important fact is that the Luckenbach *did cross* the Feltre's course and the Court so clearly found (R. 1426).

After setting forth the isolated phrases referred to above, petitioner makes the over-bold statement that there is no statement or finding in the majority opinion that the evidence against the Edward Luckenbach was clear and convincing or free from doubt (Petition, p. 6). Petitioner is mistaken. The Court said (R. 1421):

> "Whether each vessel was guilty of all of the faults attributed to it we need not inquire, since it is clear that each was guilty of one or more serious navigational faults contributing to the collision."

It is, then, perfectly clear from the opinion of the Circuit Court of Appeals that it did not hold petitioner's

vessel at fault on doubtful evidence. It is equally clear that the Court did not have or express any doubt as to the fault of petitioner's vessel in causing the collision.

Petitioner, continuing its disregard of the record, states that the opinion below "cited no authority to sustain its decision against the Edward Luckenbach (Petition, p. 6). The opinion below quotes Section 210 of Title 33 U. S. Code and states: "We agree that the narrow channel rule is applicable" (R. 1421). Petitioner was not unaware of the authority thus cited by the Court to sustain the decision against the Edward Luckenbach, for petitioner sets forth in its brief (page 15) the above quotation from the opinion.

E. QUESTIONS OF FACT, AGREED UPON BY THREE COURTS BELOW, PRESENT NO REASON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

Petitioner's stated reason for allowance of a writ of certiorari herein is that the decision below conflicts with decisions of this Court and of Circuit Courts of Appeals (Petition, p. 12).

Since the only question presented by petitioner is the comparative weight of the evidence which supports the findings of fact, it is obvious that the determination of that question in this particular case cannot possibly conflict with the determination of the facts on wholly different evidence in other unrelated cases.

In *General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, this Court said:

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

SUMMARY OF ARGUMENT.

I. The concurrent findings of the three Courts below that petitioner's vessel violated the narrow channel rule is supported by conclusive evidence.

1. The testimony of petitioner's own witnesses establishes its fault.

2. Petitioner's own records establish its fault.

3. Competent, disinterested witnesses saw the Luckenbach proceeding up the wrong side of the channel.

4. The Feltre witnesses saw the Luckenbach cross the Feltre's range course.

II. The authorities cited by petitioner do not in any way conflict with the decision below.

1. Petitioner's vessel was found guilty of a major fault on clear evidence.

2. Petitioner was accorded a trial *de novo*.

III. The dissenting opinion is based on assumptions of fact which are not supported by the record.

ARGUMENT.

I.

THE CONCURRENT FINDINGS OF THE THREE COURTS BELOW THAT PETITIONER'S VESSEL VIOLATED THE NARROW CHANNEL RULE IS SUPPORTED BY CONCLUSIVE EVIDENCE.

Since the petition herein seeks merely to have this Court review the weight of the evidence, it presents no proper ground for review on writ of certiorari. We, therefore, deem it to be unnecessary to set forth a detailed discussion of the evidence. A short summary of the evidence against petitioner will show the "clear and convincing" character of the evidence supporting the finding that petitioner's vessel violated the narrow channel rule. Such summary will also reveal the one-sided nature of petitioner's reference to the evidence in its brief.

1. The testimony of petitioner's own witnesses establishes its fault.

(a) Captain McNelly, pilot of the Edward Luckenbach, testified that when the white light on the middle dike of Cottonwood Island was betwen the bow and bridge of his vessel, the light bore about a point on the port bow (R. 1311). This bearing, of course, placed the Luckenbach very close to the light on her extreme lefthand side of the channel.

He also testified that when he later ordered right rudder, which petitioner contends was about three minutes before the collision, the Luckenbach was 250 to 300 feet off the Upper Cottonwood Island Range, the Feltre's proper course (R. 1299). The Luckenbach was then proceeding on a course of 155.5°, which would converge with that of

the Feltre (R. 428, 1425). Since a vessel will advance two or three lengths (the Luckenbach is 457 feet long) along her old course before gaining ground on the new course, the Luckenbach necessarily advanced along her old course of 155.5° for well over 300 feet and thereby crossed the Feltre's range course, a violation of the narrow channel rule.

Ocean S.S. Co. v. U. S., 38 F. (2d) 782, 784 (2 C.C.A.);

Marshall Field & Co. v. U. S., 48 F. (2d) 763, 767 (2 C.C.A.).

(b) Captain Murphy, master of the Luckenbach, testified that his vessel "came over on this Upper Cottonwood Island Range" (R. 403). The range referred to was the Feltre's proper course and was well on the Luckenbach's lefthand side of the channel in the vicinity of the collision (R. 1423).

In view of the foregoing testimony of both the pilot and the master of the Luckenbach, it is difficult to comprehend the basis for petitioner's criticism of the finding by the Circuit Court of Appeals that the Luckenbach crossed the Feltre's proper course and thereby violated the narrow channel rule (Petitioner's Brief, pp. 32-33).

(c) Rupp, the helmsman of the Luckenbach, testified that when the one-blast signal was blown by the Feltre, the Luckenbach's pilot gave him the order "Hard right", which he executed (R. 533, 550, 554). Second Officer Hodson of the Luckenbach testified that "hard right" means "to turn the vessel as rapidly as possible" (R. 830). This testimony is an admission that the Luckenbach was at that time on the wrong side of the channel. It is perfectly

obvious that if the Luckenbach had been on her right side of the river she would have changed her course only a few degrees to the right merely to insure a wider margin of passing the Feltre who was admittedly on a proper course at that time (R. 1423).

(d) Petitioner's witnesses all agreed that the Feltre blew a two-blast signal and thereupon turned left when the two vessels were 500 to 690 feet apart and less than one-half minute before the collision (R. 410, 487, 586, 1288). It was not disputed, as stated in the opinion below, that the Feltre was proceeding on her proper range course at the time she blew the two-blast signal (R. 1423). The Feltre could not possibly leave such course on the range in traveling her portion of the 500 to 690 feet which separated the two vessels, but would "advance" along her range course two or three lengths before gaining any ground to the left. The testimony of the Luckenbach's officers as to the distance between the two vessels less than one-half minute before the collision thus conclusively establishes that the collision occurred on the Luckenbach's lefthand side of the channel.

2. Petitioner's own records establish its fault.

The Luckenbach was equipped with a course recorder which automatically recorded the courses steered (R. 229). The courses so recorded are shown on Petitioner's Exhibit No. 7, Murphy. The courses shown on this record corroborate the testimony of all the eyewitnesses who saw the Luckenbach proceeding on the wrong side of the river (R. 1427).

3. Competent, disinterested witnesses saw the Luckenbach proceeding up the wrong side of the channel.

Three witnesses who were on vessels following the Luckenbach upstream testified that she was proceeding on the lefthand side of the channel. These witnesses had no interest whatever in the litigation. They were familiar with the river, the channel and the navigational lights. Their disinterest entitles their testimony to particular weight (R. 1425). Their testimony alone is clear and convincing evidence that the Luckenbach violated the narrow channel rule.

Captain Henry F. Stayton, Columbia River pilot in charge of the steamer West Camargo, testified that when the Luckenbach passed between the red flashing buoy and the green light marking the channel at the upper end of Cottonwood Island, she was much nearer to the green light on her lefthand side of the channel than she was to the red light (R. 1127-1128).

Captain R. E. Carrau, pilot on the river tug Georgia Burton, and his watchman, Lloyd Deuchar, both testified that the Luckenbach was well on her left side of the channel when she passed between the red and green lights (R. 1078-1079, 1110).

It is admitted that after the Luckenbach had passed between the red and green lights she proceeded for four minutes on a course of 155.5°, as shown by her course recorder (R. 427, 1283). This course pursued from the left side of the channel off the green light for four minutes at a speed of 7.77 knots, the speed petitioner claims, necessarily carried the Luckenbach across the range course of the Feltre. Despite the clear statement of these facts in

the opinion below (R. 1425), petitioner has the temerity to state that such conclusion was based solely on the Conway chart (Brief, pp. 29-30). Perhaps petitioner in disjointing the opinion below for its particular purposes has overlooked the contents thereof as a whole.

4. The Feltre witnesses saw the Luckenbach cross the Feltre's range course.

The Feltre witnesses testified that the Luckenbach proceeded across their course from left to right, obscured the lights of the upper range and finally turned right into collision (Turppa, R. 1013-1015; Magris, R. 966-968; Cernolli, R. 934, 939; Roiaz, R. 948).

Their testimony definitely shows that the Luckenbach was on the wrong side of the channel as the two vessels approached collision. Such testimony in itself amply supports the findings made below. Their testimony is fully corroborated by the evidence referred to above. In addition the Feltre was proceeding down a range course definitely fixed by lights so her position in the channel was known (R. 1422-1423). The Luckenbach witnesses could not definitely fix her location in the channel at the time of the collision (R. 506, 788, 828, 1295). There is, therefore, valid reason for giving greater credence to the Feltre witnesses than to the Luckenbach witnesses.

The evidence of petitioner's own witnesses and its own records, the testimony of disinterested, maritime eye-witnesses, and the testimony of the Feltre's witnesses is certainly "clear and convincing" proof that the Luckenenbach violated the narrow channel rule. The Courts below could not reasonably have made any other finding.

II.

THE AUTHORITIES CITED BY PETITIONER DO NOT IN ANY WAY CONFLICT WITH THE DECISION BELOW.

1. Petitioner's vessel was found guilty of a major fault on clear evidence.

Petitioner refers to cases setting forth the so-called "major and minor fault rule" (Brief, p. 36). The rule simply means that where the gross fault of one vessel is established by uncontradicted evidence, and such fault is, of itself, sufficient to account for the collision, it is not sufficient for such vessel to raise merely a doubt with regard to the management of the other vessel.

The faults charged and proved against the Luckenbach were not acts of merely doubtful management. The Luckenbach was found guilty of violating the narrow channel rule, a statutory and major fault. A vessel which is found guilty of a statutory fault has the burden of proof to show not merely that her fault might not have been one of the causes, but that it could not have been a cause of the collision.

> *Lie v. San Francisco & P. S. Co.*, 243 U. S. 291, 298, 61 L. Ed. 726, 733.

Since it is clear both from the record and the opinions of the Courts below that there is especially strong evidence to support such finding of fault against the Luckenbach, the major and minor rule is satisfied in any event.

However, an examination of the cases cited by petitioner will show that the major and minor fault rule was in each instance applied against the vessel guilty of the *initial* fault. It is clear in this case that the Luckenbach was on

the wrong side of the channel for a considerable time prior to the collision (R. 1422). The faults which the Feltre subsequently committed were faults induced by and made operative by the Luckenbach's violation of the narrow channel rule. The Feltre's faults of themselves, therefore, are not sufficient to account for the collision. The Courts below did not find that the faults of the Feltre of themselves accounted for the collision, but expressly found that the faults of each vessel contributed to the collision (Finding 12, R. 246; Finding IX, R. 293; R. 1421).

Petitioner states throughout its petition and brief that nearly all of the faults of the Feltre were established by uncontradicted testimony (Petition, p. 3; Brief, p. 13). This statement is not accurate. Certain of the acts or maneuvers of the Feltre were frankly admitted by her witnesses, but there was a conflict between the two vessels as to the time, place and circumstances attendant upon such maneuvers. For example, the Feltre admittedly did not stop and reverse, but her lack of action in this respect was not a fault unless the Luckenbach was on the Feltre's side of the channel. The Luckenbach claims that she was on her side of the channel and the Feltre denies that claim. The fault of the Feltre was established by resolving such conflict. This case is not one, then, where the gross fault of one vessel, sufficient in itself to account for the collision, is established by uncontradicted evidence and there is doubt as to the fault of the other. On the contrary, the Courts below were satisfied by ample evidence that each vessel was guilty of faults which contributed to the collision (R. 1421). Under such circumstances both vessels are

properly held at fault even if the fault of one vessel be clearer than that of the other.

The Albert Dumois, 177 U. S. 240, 255, 44 L. Ed. 751, 760;

The Chattahoochee, 173 U. S. 540, 543, 43 L. Ed. 801, 803.

2. Petitioner was accorded a trial de novo.

Petitioner contends that the Circuit Court of Appeals failed to accord it a trial *de novo* (Brief, p. 38). This contention is apparently based upon the fact that the Court, having found petitioner's vessel guilty of violating the narrow channel rule, found it unnecessary to discuss all the other faults found against it by the Special Master and the District Court.

It is apparent from the opinion below that the Court did weigh and consider the evidence as a whole. The Court did not merely state that there was some evidence to support the trial Court's findings. The Court stated that the *weight* of the evidence required an affirmance (R. 1421). The opinion discusses the evidence in sufficient detail to show that both vessels were clearly at fault for the collision. An Appellate Court is certainly not required to set forth in its opinion a discussion of all the evidence contained in a record of over 1400 pages.

The finding by the Court below that petitioner's vessel violated the narrow channel rule was sufficient to establish petitioner's liability and to support the decree against it. Petitioner is just as liable for one contributory fault as for a dozen.

The San Simeon, 63 F. (2d) 798, 801 (2 C.C.A.).

Findings that petitioner was or was not guilty of the other faults charged to it could in no conceivable manner affect the finding that the Luckenbach violated the narrow channel rule. When a Court has determined issues which are sufficient to dispose of the case, it is unnecessary to consider other questions which could not affect the result.

Hobbs v. Head & Dawst Co., 231 U. S. 692, 700, 58 L. Ed. 440, 444;

Great Northern R. Co. v. Weeks, 297 U. S. 135, 152, 80 L. Ed. 532, 543;

M'Lanahan v. The Universal Insurance Co., 26 U. S. 170, 182, 7 L. Ed. 98, 104.

III.

THE DISSENTING OPINION IS BASED ON ASSUMPTIONS OF FACT WHICH ARE NOT SUPPORTED BY THE RECORD.

The dissenting judge expressly states that his disagreement with the majority of the Court is entirely on questions of fact and that he agrees with the majority on the law applicable to determining liability for the collision (R. 1427, 1433). The dissenting opinion thus confirms that no important question is here presented for review on writ of certiorari. A brief reference to the dissenting opinion will emphasize the correctness of the concurrent findings of the Special Master, the District Court and the Circuit Court of Appeals.

The dissenting opinion is based on two assumptions. First, the dissenting judge assumes that the collision occurred at practically the spot where the Feltre came to

rest in the river after the collision.[3] This conclusion is based on the fact that certain wreckage from both vessels was found near the sunken Feltre (R. 1434). The anchor flukes of the Luckenbach were found not merely after the collision but after the Feltre wreck had been raised and removed from the river (R. 861). However, the expert called by petitioner testified that the pieces of the Feltre's wreckage were found too close to her side to determine how far she may have moved to her left after the collision (R. 895). The witness recognized that the force of the collision would tend to set the Feltre to her left (R. 881).

It is inconceivable as a physical fact that the heavily loaded Feltre, moving at full speed, struck at a sharp angle, would sink at the moment of collision (*The San Simeon,* 63 F. (2d) 798, 799 (2 C.C.A.)). The vessels admittedly cleared each other before the Feltre sank after the collision, indicating that the Feltre thereafter moved at least her own length (R. 411). The men in the Feltre's engine room had time after the collision to escape to the main deck (R. 957-959). Pilot Turppa stated that the Feltre ran about 400-500 feet before grounding (R. 1018-1019). He also testified that the Luckenbach shoved the Feltre along to her left (R. 1048).

The Feltre grounded less than 4000 feet above the red buoy. The Luckenbach claims to have proceeded for seven

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[3]The position of the Feltre wreck in the river after the collision is shown on Petitioner's Exhibit 1, MacDuffee (not printed). The position of the Feltre shown on the chart attached to the majority opinion and to petitioner's brief herein is not accurate, being merely a freehand drawing of the Feltre depicting her as having a length of about 900 feet and a beam of about 300 feet, although she actually has a length of 460 feet and a beam of 55 feet (R. 1417).

minutes from the red buoy to the point of collision (R. 427-429, 1279). The Luckenbach admits a speed of 7.77 knots, so she must have run about 5500 feet from the red buoy to the point of collision or more than 1500 feet above the point where the Feltre grounded. The dissenting opinion fixes her speed at about 10 knots which would place the point of collision about 3000 feet above the point where the Feltre grounded. It is, therefore, apparent that the Feltre moved an appreciable distance to her left and downstream after the collision (she was moving under a left rudder and was struck on her starboard side). The collision under these circumstances certainly occurred on or near the Feltre's range course, for the Feltre grounded only about 150 feet to her left of midchannel (Petitioner's Exhibit No. 1, MacDuffee).

However, even the assumption of the dissenting judge that the collision occurred where the Feltre grounded does not justify his conclusion that such assumption shows that the Luckenbach had been proceeding up her side of the channel. The judge overlooks an important and inescapable fact. Petitioner states that the Luckenbach commenced to swing right three minutes before the collision and swung a total of 33° (Brief, p. 19). In proceeding for three minutes on a right swing at a speed of 8 to 10 knots, the Luckenbach necessarily gained a distance of 300 feet or more to her right. She, then, was on the Feltre's side of the river when the right swing commenced.

Most of the distance gained by the Luckenbach to the right would be gained in the last minute of the swing because of the vessel's advance. It is, therefore, obvious that the Luckenbach was still on the Feltre's side of the

channel in the last minute before the collision, as the Feltre grounded only about 150 feet beyond midchannel. Hence, even if the collision occurred where the Feltre grounded, that fact does not show that the Luckenbach had been proceeding up her side of the channel, but shows that she had reached that point only by moving from the wrong side of the channel in the last minute when the vessels were in the jaws of collision by reason of their previous negligent navigation.

This Court said in *The America*, 92 U. S. 432, 437, 23 L. Ed. 724, 726:

> "Inability to do anything effectual to prevent a collision, at the moment it occurs, usually exists; but it seldom happens that there is much difficulty in tracing the cause which produced it to some antecedent neglect, carelessness or unskillfulness in those having the command of one or both vessels."

Similarly in *The Modemi*, 58 F. (2d) 916, 917 (5 C.C.A.), the Court said:

> "Study of the record has convinced us, too, that the real fault in this case is not to be sought, or the real responsibility fixed, by a determination of what maneuver last preceded the collision. The fault lies farther back."

The dissenting judge, having made the assumption that the collision occurred where the Feltre grounded, was compelled to make a second assumption of fact in order to account for the Feltre being able to reach that point of collision from her course on the range. He, therefore, assumed that the Feltre had turned left off her range course sometime before she gave her two-blast signal (R.

1437-1439). This assumption is contrary to the testimony given by the navigators of both vessels. It is contrary to petitioner's pleading (Petition, paragraph XVII, R. 25). The testimony referred to by the dissenting judge does not support his assumption as it is apparent from Captain Turppa's quoted testimony that he is referring to the left turn just before the collision (R. 1438). In fact, as stated by the majority opinion, it was not disputed by petitioner that the Feltre continued on her range course until the two-blast signal was given (R. 1423). The Luckenbach witnesses, who testified that they continuously observed the Feltre, insisted that they did not see the green light of the Feltre or any change of her heading until the Feltre blew her two-blast signal (R. 408, 779, 782, 1293-1294). Any change of heading by the Feltre would be immediately apparent to them from her range lights.

Nevertheless, the dissenting judge assumes that the Feltre did turn left before her two-blast signal, apparently forgetting that, if this be so, the Luckenbach navigators were negligent in failing to observe and act upon such change. Petitioner made no such argument for it was well aware that if the Feltre turned left while far enough upstream from the Luckenbach to proceed 300 feet to the left of the range, the Luckenbach would immediately have been required to blow a danger signal, stop and reverse, which she did not do. The argument of the dissenting judge convicts the Luckenbach of that fault.

The Albert Dumois, 177 U. S. 240, 252, 44 L. Ed. 751, 759;

The San Simeon, 63 F. (2d) 798, 801 (2 C.C.A.).

CONCLUSION.

We respectfully submit that the petition for writ of certiorari should be denied, as petitioner merely seeks to review the weight of the evidence upon which concurrent findings of fact were made by the Special Master, the District Court and the Circuit Court of Appeals.

Dated, San Francisco, California,
July 17, 1942.

Respectfully submitted,
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Cargo Claimants.

JAMES A. QUINBY,
LLOYD M. TWEEDT,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of July, 1942.

_____

_____

_____

Counsel for Petitioner,
Luckenbach Steamship Company, Inc.

_____

_____

Counsel for Respondent,
Societa Anonima Partecipazioni
Industriali Commerciali, et al.

In the Supreme Court of the United States

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CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1942

No. 153

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre"),
HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),

Respondents.

Petitioner's Reply Brief In Support of Petition for Writ of Certiorari

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HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),

Respondents.

Petitioner's Reply Brief In Support of Petition for Writ of Certiorari

The answer to the arguments that are advanced by respondents in opposition to the petition for a writ of

certiorari will be found in the dissenting opinion of Judge Wilbur (R. 1427-60) which is printed in full in the appendix to petitioner's opening brief.

We are confident that this court will not deny to petitioner a review of an erroneous decision in a collision case when it clearly appears from the record, as is shown conclusively in the dissenting opinion, that the decision is wholly unsupported by the evidence.

The contention of respondents that petitioner is foreclosed by the decisions of the lower courts, would, if sustained, deprive petitioner of the right to a decision based upon the established facts, and subject petitioner to a heavy award of damages because of an arbitrary rule, regardless of the facts.

Such a decision would be in violation of petitioner's right to have an admiralty appeal considered as a trial *de novo* on all the evidence.

THE COMMISSIONER AND THE LOWER COURTS MADE FINDINGS AGAINST PETITIONER'S VESSEL THAT WERE WHOLLY UNSUPPORTED BY ANY EVIDENCE WHATSOEVER.

In order to show the court clearly that the conclusions in the dissenting opinion of Judge Wilbur with respect to the lack of evidence were fully sustained by the record, and that the findings of the District Court and the decision of the majority of the Circuit Court of Appeals were clearly erroneous, we will review in detail a single finding of fault against the "Edward Luckenbach", namely, the alleged failure to take compass bearings.

An examination of the entire record will show that there was *no mention whatever* of compass bearings or of any failure to take compass bearings by the "Edward Luckenbach" in connection with fixing the location of the "Feltre".

Nor was the alleged failure to take compass bearings even referred to in the pleadings (R. 4-18; 33-49; 55-78; 78-95).

Nevertheless, the commissioner, without any foundation whatever in the evidence, or in the pleadings, found that the "Edward Luckenbach" was at fault in that, among other things, she "failed to take compass bearings of the approaching Feltre" (R. 245).

Now it may be, as respondents Hawaii Liquor Company, Limited, et al., inform this court, that the commissioner was "an experienced Special Master" (Brief p. 2), but the record shows clearly that he committed a material error in making the above finding of fault without any evidence whatever to sustain the finding. Furthermore, the alleged failure to take compass bearings, even if there had been any such failure, was not a fault under the Rules of the Road (*Wilder's S. S. Co. v. Low* (C.C.A. 9), 112 F. 161).

Petitioner filed express exceptions to the foregoing finding of fault, as follows (R. 259):

> "(3) The finding that the 'Luckenbach' was in fault for failing to take compass bearings of the 'Feltre' was clearly erroneous in that,—
>
> (a) There is no evidence whatever to support the finding, the same being based on a bald statement in

cargo claimants' brief without reference to any testimony.

(b) No claim of fault was asserted in the pleadings or at the hearing with respect to the alleged failure to take compass bearings.

(c) There is no statutory requirement for the taking of such bearings. * * *"

The District Court, however, notwithstanding the undisputed record to the contrary, overruled the exceptions, confirmed the commissioner's report, and entered a finding that the "Edward Luckenbach" was at fault for failure to take compass bearings (R. 288, 294).

On appeal to the Circuit Court of Appeals, petitioner assigned as error the finding of the District Court with respect to the alleged failure to take compass bearings, as follows (R. 310):

"XXII.

"The District Court erred in finding that the steamship Edward Luckenbach failed to take any compass bearings of the approaching Feltre, and that said bearings would have permitted the Edward Luckenbach to observe a safer margin in passing the Feltre.

XXIII.

The District Court erred in failing and refusing to find that there was no evidence whatsoever to support the finding that the Edward Luckenbach was in fault for failing to take compass bearings of the Feltre.

XXIV.

The District Court erred in failing and refusing to find that no claim of fault was asserted in the plead-

> ings or at the hearing with respect to the alleged failure of the Edward Luckenbach to take compass bearings."

The majority of the Circuit Court of Appeals, as we have shown in petitioner's opening brief, stated that the evidence generally was "*in sharp conflict*" (R. 1421), and as to whether each vessel was guilty of all the faults attributed to it "we need not inquire" (R. 1421). There is no mention of any evidence relating to compass bearings.

The findings and decree of the District Court were affirmed.

In the dissenting opinion, however, Judge Wilbur correctly disposed of the matter of compass bearings by stating (R. 1459):

> "The commissioner also found that the Edward Luckenbach was at fault in failing to take compass bearings of the Feltre. No such fault was alleged in the pleadings, and there is no testimony indicating that such compass bearings would have been of any value under the circumstances."

It is clear, therefore, that of the commissioner, the District Court, and the Circuit Court of Appeals, only the senior circuit judge who wrote the dissenting opinion reached a correct conclusion with respect to the use of compass bearings. It is equally clear that an examination of the record, as is required on a trial *de novo,* would have convinced the judges in both courts and the commissioner that there was not a syllable of testimony relating to the alleged failure to use compass bearings.

What has been said with respect to compass bearings is likewise applicable to other alleged faults found against

the "Edward Luckenbach", not discussed in the majority opinion, but conclusively disposed of in the dissenting opinion. Judge Wilbur, after a close analysis of the evidence stated (R. 1459):

> "I conclude that the Edward Luckenbach did not fail seasonably to sound the danger signal, stop and reverse.
>
> The finding of the commissioner and the trial court that the Edward Luckenbach proceeded at an immoderate speed is not sustained by the evidence. The evidence in that regard is that her speed did not exceed 10 or 10½ knots, owing to a head wind and ebb tide."

It could hardly be urged that the hearing of petitioner's appeal on a trial *de novo* was not materially prejudiced by the unwarranted and erroneous action of the majority of the Circuit Court of Appeals, in affirming findings against petitioner that were wholly unsupported by any evidence.

If respondents' contentions are correct with respect to the binding force of the decisions of the lower courts, petitioner would be denied a review by this court merely because a commissioner and two lower courts had arrived at an obviously erroneous decision, contrary to the record, notwithstanding that the record and the dissenting opinion on appeal established that the decision was clearly wrong.

This court, in justice to petitioner, and in exercise of its discretionary right to review all admiralty causes on appeal, should not permit such an erroneous decision to stand without a re-examination of the record and a careful consideration of the argument and conclusions set forth in the able dissenting opinion.

A review of the entire record on the only issue that was considered by the majority of the court on appeal, namely, the alleged violation of the "narrow channel" rule, will show clearly that the finding of the commissioner was based *solely* upon the Conway chart, an erroneous computation of the "Edward Luckenbach's" alleged position.

This chart, however, was rejected by the appellate court, majority and minority alike.

The majority opinion states (R. 1427):

> "We will not undertake to appraise the value of the charted course, and we have given it little consideration in evaluating the testimony."

In the dissenting opinion Judge Wilbur stated that the chart "should be entirely disregarded" (R. 1441) and that it was "utterly worthless" (R. 1442).

Nevertheless, the majority of the court affirmed the decision against the "Edward Luckenbach", which decision was based on the commissioner's findings of the position allegedly established by the Conway chart.

The dissenting opinion, however, reached the *contrary* conclusion, stating (R. 1457):

> "I conclude that the Edward Luckenbach was not at fault in passing to the left hand side of the channel or in failing to allow sufficient space for safe passage of the Feltre."

From the foregoing, and upon the grounds set forth in the petition and accompanying brief, and particularly in the dissenting opinion of Judge Wilbur, we are confident

that this court will determine that the erroneous decision of the majority of the Circuit Court of Appeals should be reviewed and that petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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